

Commissioner, Indiana Department of Environmental Management v.  
Donna Landers and William Landers  
2009 OEA 109, (06-S-E-3832)

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**OFFICIAL SHORT CITATION NAME:** When referring to 2009 OEA 109, cite this case as  
*IDEM v. Donna Landers and William Landers, 2009 OEA 109.*

**TOPICS:**

solid waste  
open dumping  
mobile home  
salvage operation  
“Reports of Open Dump Inspection”  
demolition  
construction  
household waste  
health  
waste removal schedule  
payment of a civil penalty  
settlement conference  
I.C. § 13-30-2-1  
329 IAC 10-4-3

**PRESIDING ENVIRONMENTAL LAW JUDGE:**

Mary L. Davidsen

**PARTY REPRESENTATIVES:**

IDEM: Nancy A. Holloran, Esq.  
Petitioner: Mark Shere, Esq.

**ORDER ISSUED:**

July 30, 2009

**INDEX CATEGORY:**

Land

**FURTHER CASE ACTIVITY:**

[none]

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3. Based on an anonymous referral, IDEM's series of four Site investigations began on June 13, 2003, conducted by IDEM Office of Land Quality Inspector Randy Jones ("Inspector"). Inspector Jones majored in biology and earned a Bachelor of Arts from Anderson University, then pursued, but did not complete, a Master's of Public Administration. He has been employed by IDEM for over twenty-one (21) years, primarily in solid waste compliance and inspections, including concentrated and confined animal feeding operations, landfills, open dumping, and septic trucks. Inspector Jones estimated that he had inspected hundreds of open dump facilities during his tenure with IDEM.
4. The two investigations at controversy in this cause were conducted on January 13, 2004 and June 21, 2004, and each reported by IDEM in "Reports of Open Dump Inspection", and signed by Mr. Landers. *Joint Stipulated Exhibit 1*. Neither Inspector Jones' initial June 13, 2003 IDEM report or the July 13, 2003 Report of Open Dump Inspection was the basis for IDEM's action reviewed in this cause. *See Complaint, Exs. A, B, C, D*. On January 13, 2004, Inspector Jones observed waste resulting from mobile home demolition, which waste included tires, and parts of mobile homes in pieces of bulky waste, household waste, construction and demolition waste appearing at least as large as six cubic feet, to fragments as small as at least a half cubic inch. *Complaint Ex. C; Exs. F through R (site photos taken by Inspector Jones)*. The waste covered over an acre on the Site. *Id.* The Site also included some intact mobile homes. *Id.*
5. On January 13, 2004, IDEM Inspector Jones also observed evidence of recent dumping, waste stored within six hundred feet (600') of a residence, and further suspected that waste was stored within a floodway. *Complaint Ex. C*.
6. On June 21, 2004, Inspector Jones conducted another Site inspection, and observed conditions similar to those observed six months earlier, on January 13, 2004, but with the addition of putrescible waste. *Complaint Ex. D*. The waste covered over an acre on the Site. *Id.* The June 21, 2004 "Report of Open Dump Inspection" was signed by Mr. Landers, who acknowledged that the site was being referred to the IDEM Office of Enforcement. *Id.*
7. At Final Hearing, Mr. Landers testified that he was paid to store some of the deposits on Site, and earned some funds from selling some of the materials. He testified further that some of the materials had caught fire, possibly due to arson, and that the local fire department responded. Both Mr. Landers and Inspector Jones testified that over the course of inspections, that Mr. Landers had stated the intent to remove stored waste. Mr. Landers stated that he was not able to accomplish his stated intent, due to health and financial considerations, but that he had removed some of the waste, and some of the materials could be sold or recycled. Mr. Landers testified that his health and his financial considerations also hindered his ability to sell or recycle the material.

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8. IDEM issued a Notice of Violation and Proposed Agreed Order to Landers' ("NOV") on November 1, 2004 *Complaint's Ex. S*. The NOV stated that the Landers did not comply with I.C. § 13-30-2-1 (3, 4, 5) and 329 IAC 10-4-2 and -3 because the mobile home demolition debris was a contaminant or solid waste open dumped on land, in violation of Indiana law and rules adopted by the Solid Waste Management Board. *Id.*
9. The NOV contained an offer to enter into an Agreed Order ("AO") per I.C. § 13-30-3-3. The AO contained actions to be performed by Landers, including a waste removal schedule and payment of a civil penalty. *Id.* The Landers did not enter into the AO.
10. IDEM and Respondents Landers participated in a settlement conference on November 29, 2004. Additional AOs and negotiations were conducted; subsequent AOs were issued by IDEM to the Landers in February, 2005, March, 2005, September, 2006 and November, 2006.
11. On November 30, 2006, IDEM's Commissioner issued a Notice and Order ("Commissioner's Order") pursuant to I.C. § 13-30-3-4. *Joint Stipulated Ex. 1*.
12. The Commissioner's Order required the Landers to comply with I.C. § 13-30-2-1 (3, 4, 5) and 329 IAC 10-4-2 and -3, including cease placing further deposits, to remove existing deposits per a compliance schedule, and pay a civil penalty of \$8,750. *Id.* The Landers, through counsel, timely filed a Petition for Administrative Review ("Petition") of the Commissioner's Order on December 8, 2006.
13. A Final Hearing was conducted on December 10, 2007; the parties submitted proposed findings of fact, conclusions of law and final orders on February 11, 2008.
14. In their February 11, 2008 Proposed Findings of Fact, Conclusions of Law and Final Order, the Landers expressly "stipulate[d] their willingness to remove the material in these old breakdown piles to a licensed landfill within ninety days of OEA's final order".

**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 I.C. § 13-13, *et seq.* The Office of Environmental Adjudication ("OEA") has jurisdiction over the decisions of the Commissioner of IDEM and the parties to this controversy pursuant to I.C. § 4-21.5-7, *et seq.*
2. This is a Final Order issued pursuant to I.C. § 4-21.4-3-27. 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.

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3. This Court 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), *Indiana-Kentucky Electric v. Commissioner, Indiana Department of Environmental Management*, 820 N.E.2d 771 (Ind. Ct. App. 2005). Findings of fact must be based exclusively on the evidence presented to the ELJ, I.C. § 4-21.5-3-27(d). Deference to the agency's initial determination is not allowed. *Id.*; "*De novo* review" means that:

all issues are to be determined anew, based solely upon the evidence adduced at that hearing and independent of any previous findings.

*Grisell v. Consol. City of Indianapolis*, 425 N.E.2d 247, 253 (Ind. Ct. App. 1981).

4. OEA is required to base its factual findings on substantial evidence. *Jennings Water, Inc. v. Office of Environmental Adjudication, Commissioner, Indiana Department of Environmental Management, and Talara Lykins*, 2009 Ind. App. Lexis 965, p. 13 (Ind. Ct. App. July 20, 2009); *Huffman v. Office of Env'tl. Adjud.*, 811 N.E.2d 806, 809 (Ind. 2004)(appeal of OEA review of NPDES permit); *see also* I.C. § 4-21.5-3-27(d). While the parties disputed whether IDEM's determination that Landers were open dumping, OEA is authorized "to make a determination from the affidavits . . . pleadings or evidence." I.C. § 4-21.5-3-23(b). "Standard of proof generally has been described as a continuum with levels ranging from a "preponderance of the evidence test" to a "beyond a reasonable doubt" test. The "clear and convincing evidence" test is the intermediate standard, although many varying descriptions may be associated with the definition of this intermediate test." *Matter of Moore*, 453 N.E.2d 971, 972, n. 2. (Ind. 1983). The "substantial evidence" standard requires a lower burden of proof than the preponderance test, yet more than the scintilla of the evidence test. *Burke v. City of Anderson*, 612 N.E.2d 559, 565, n.1 (Ind. Ct. App. 1993). *GasAmerica #47*, 2004 OEA 123, 129. *See also Blue River Valley*, 2005 OEA 1, 11-12. *Objection to the Denial of Excess Liability Trust Fund Claim Marathon Point Service, ELF # 9810570/FID #1054, New Castle, Henry County, Indiana; Winimac Service, ELF #9609539/FID #14748, Winimac, Pulaski County, Indiana; HydroTech Consulting and Engineering, Inc. (04-F-J-3338)*, 2005 OEA 26, 41.
5. IDEM alleges that the Respondents violated I.C. § 13-30-2-1(3), which provides, in pertinent part:
- A person may not do any of the following:
- ...
- (3) Deposit any contaminants upon the land in a place and manner that creates or would create a pollution hazard that violates or would violate a rule adopted by one (1) of the boards.

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6. IDEM alleges that the Respondents violated I.C. § 13-30-2-1(4), which provides, in pertinent part:

A person may not do any of the following:  
...  
(4) Deposit or cause or allow the deposit of any contaminants or solid waste upon the land, except through the use of sanitary landfills, incineration, composting, garbage grinding, or another method acceptable to the solid waste management board.
7. IDEM alleges that the Respondents violated I.C. § 13-30-2-1(5), which provides, in pertinent part:

A person may not do any of the following:  
...  
(5) Dump or cause or allow the open dumping of garbage or of any other solid waste in violation of rules adopted by the solid waste management board.
8. IDEM alleges that the Respondents violated 329 IAC 10-4-2, which provides:

No person shall cause or allow the storage, containment, processing, or disposal of solid waste in a manner which creates a threat to human health or the environment, including the creating of a fire hazard, vector attraction, air or water pollution, or other contamination.
9. IDEM alleges that the Respondents violated 329 IAC 10-4-3, which provides:

Open dumping and open dumps, as those terms are defined in I.C. § 13-11-2-146 and I.C. § 13-11-2-147, are prohibited.
10. Solid waste is defined as “garbage”, “refuse”, or “other discarded material”. I.C. § 13-11-2-205(a).
11. While Mr. Landers’s testimony provided substantial evidence that he intended that some of the material was to be recycled or sold, he also presented testimony that he had not sold or recycled the material per his original intent. IDEM presented substantial and reliable evidence that the mobile home material placement on the Site showed that the Site was being used for open dumping of solid waste and that the Respondents caused and/or allowed mobile home demolition debris, a contaminant, to be deposited at the Site, in violation of I.C. § 13-30-2-1(3), I.C. § 13-30-2-1(4), I.C. § 13-30-2-1(5), 329 IAC 10-4-2 and 329 IAC 10-4-3.
12. The Landers argue that the amount of time between the violation and the issuance of the Commissioner’s Order should be considered. However, Landers do not present any evidence that this lapse of time prejudiced them. The mere passage of time is insufficient, without a showing of prejudice, to convince the Court that the Landers should not be found in violation.

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13. The Landers argue that the Commissioner's Order demands the impossible task of having the Landers remove all of the homes and that they cannot begin to afford the cost of having all these homes hauled off. The applicable regulations do not afford the Court the flexibility of allowing compliance cost to eliminate a duty to comply with applicable law.
14. The Respondents also argues that no technical violations of any IDEM standard occurred. However, according to the statutes and rules that govern this action, for which this court has taken judicial notice, specifically, I.C. § 13-30-2-1(3), I.C. § 13-30-2-1(4), I.C. § 13-30-2-1(5), 329 IAC 10-4-2 and 329 IAC 10-4-3, IDEM presented substantial evidence that open dumping violations occurred at the Site.
15. In their proposed findings of fact, conclusions of law, and order, the Landers argue that the intact mobile homes, and materials which can be sold or recycled, do not constitute solid waste. Landers also stipulated to removal of material in the "old breakdown piles" within ninety (90) days of a Final Order from OEA. Therefore, Landers argue that their stipulation to remove this material within ninety days of a final order from OEA renders moot any determination that the material constituted solid waste. The Court finds no legal support for such a finding.
16. IDEM may elect to use its Civil Penalty Policy<sup>1</sup> to determine the appropriate penalty in this matter. According to this policy, a civil penalty is calculated by "(1) determining a base civil penalty dependent on the severity and duration of the violation, (2) adjusting the penalty for special factors and circumstances, and (3) considering the economic benefit of noncompliance." The base civil penalty is calculated taking into account two factors: (1) the potential for harm and (2) the extent of deviation.
17. The policy states that the potential for harm may be determined by considering "the likelihood and degree of exposure of person or the environment to pollution" or "the degree of adverse effect of noncompliance on statutory or regulatory purposes or procedures for implementing the program." There are several factors that may be considered in determining the likelihood of exposure. These are the toxicity and amount of the pollutant, the sensitivity of the human population or environment exposed to the pollutant, the amount of time exposure occurs, and the size of the violator.
18. For the violations of I.C. § 13-30-2-1(3, 4, 5) and 329 IAC 10-4-2 and -3, the potential for harm is moderate. Open dumping of mobile home debris is an open dumping situation not allowed under the applicable statues and rules, as noted above. There was a large quantity of solid waste determined by IDEM Inspector Randy Jones to be present on the Site as evidenced by Complainant's Exhibits A-S and by IDEM testimony on the record on December 10, 2007, in this matter. Mr. Landers' testified that some of the materials burned in an on-site fire.

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<sup>1</sup> IDEM's Civil Penalty Policy is a non-rule document, ID No. Enforcement 99-0002-NPD, originally adopted on April 5, 1999 in accordance with Ind. Code § 13-14-1-11.5.

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19. The second determination for the violations of I.C. § 13-30-2-1(3, 4, 5) and 329 IAC 10-4-2 and -3, is the extent of deviation. This is a mobile home salvaging operation that brings old scrap mobile homes to this site for salvage, thereby dumping commercial waste on the Site. Therefore, the extent of deviation was moderate, as evidenced by Complainant's Exhibits A-S and by IDEM testimony on the record on December 10, 2007, in this matter.
20. According to the Civil Penalty Policy, a value is selected from the middle of the penalty matrix range to establish the base penalty. In this case, the middle range for a Moderate/Moderate violation is a penalty of \$8,750.00. This value may be adjusted by aggravating or mitigating factors. The ELJ finds neither aggravating nor mitigating factors to consider. Mr. Landers' testimony that while he was paid to receive materials, and sold some materials, that his business was not profiting. Therefore, Respondents received no economic benefit.
21. The Respondents are assessed a total civil penalty of \$8,750.00 for the violations of I.C. § 13-30-2-1(3), I.C. § 13-30-2-1(4), I.C. § 13-30-2-1(5), 329 IAC 10-4-2 and 329 IAC 10-4-3, and the November 30, 2006 Commissioner's Order is sustained. The overarching purpose of these laws is to avoid harm to the environment and public health, and to make those engaging in such activities responsible for their actions. The Landers' multiple offers to remove materials from the Site were not fulfilled, due to the Landers' economic and physical health circumstances. In their February 11, 2008 Proposed Findings of Fact, Conclusions of Law and Order, the Landers stipulated to removing a portion of the materials within ninety (90) days after the OEA's Final Order issues. The intent of the applicable regulations in this cause will be fulfilled by not assessing the total civil penalty of \$8,750.00 if the Landers remove all deposits stated in the November 30, 2006 Commissioner's Order within ninety (90) days of this order.

**FINAL ORDER**

For all of the foregoing reasons, **IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that the Respondents, Donna and William Landers, violated I.C. § 13-30-2-1(3), I.C. § 13-30-2-1 (4), I.C. § 13-30-2-1 (5), 329 IAC 10-4-2 and 329 IAC 10-4-3. Respondents, Donna and William Landers, are subject to civil penalties of Eight Thousand Seven Hundred and Fifty Dollars (\$8,750.00) for violating Indiana's environmental management laws and water pollution control laws. The Indiana Department of Environmental Management's November 30, 2006 Commissioner's Order is **AFFIRMED, EXCEPT** that should the Landers remove all deposits stated in the November 30, 2006 Commissioner's Order, per the terms and conditions stated in the Commissioner's Order, within ninety (90) days of this order, then the Landers will not be subject to payment of civil penalties.



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You are further notified that pursuant to provisions of 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. A party is eligible to seek Judicial Review of this Final Order as stated in applicable provisions of I.C. § 4-21.5, *et seq.* 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 30th day of July, 2009 in Indianapolis, IN.**

Hon. Mary L. Davidsen  
Chief Environmental Law Judge