

Commissioner, Indiana Department of Environmental Management v.  
Bud's Body Shop, Inc.  
2009 OEA 132, (05-S-E-3556)

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**OFFICIAL SHORT CITATION NAME:** When referring to 2009 OEA 132, cite this case as  
*Bud's Body Shop, 2009 OEA 132.*

**TOPICS:**

Haps lacquer thinner	Notice of Violation
Gun Wash Solvent	good faith
cleaners	used oil
spent	still bottoms
small quantity generator	waste containment area
conditionally exempt	transporter
annual manifest report	off-site shipping
I.C. § 13-30-2-1	automotive repair
I.C. § 13-30-4-1	Civil penalty
I.C. § 4-21.5-3-14	site investigation
I.C. § 4-21.5-3-27	Commissioner's Order
329 IAC 13	hazardous waste
329 IAC 3.1	Agreed Order
Ind. Trial Rule 4.6(A)	

**PRESIDING JUDGE:**

Mary L. Davidsen

**PARTY REPRESENTATIVES:**

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

**ORDER ISSUED:**

October 13, 2009

**INDEX CATEGORY:**

Land

**FURTHER CASE ACTIVITY:**

[none]

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4. The two investigations were reported by IDEM in "Industrial/Hazardous Waste Inspection Report", and signed by Tim Ginther, for Bud's. *Ex. 2.* The inspection report noted that Bud's regulatory status was a small quantity generator of hazardous waste. The hazardous waste streams included waste lacquer thinner, still bottoms, thinner rags and paint booth filters. *Id.*
5. Hazardous waste was documented as present on the Site and included Haps lacquer thinner, CP100 Gun Wash Solvent, Cleaners and Degreasers, CP10 Acrylic Lacquer Thinner, Autocryl MM toners, and Autobase Mixed Colors. *Exs. 4-9.* These products were used on-site, but when spent, were then hazardous waste.
6. The type of regulations which apply to a hazardous waste generator depend, in part, on the volume of waste generated. In this case, Bud's disputed that it is a Small Quantity Generator of Waste, contending instead that its volume qualified Bud's as Conditionally Exempt. In 1986, Bud's, by its office manager Tim Ginther, notified the U.S. Environmental Protection Agency ("EPA") on EPA form "Notification of Hazardous Waste Activity" that it was a Small Quantity Generator of hazardous waste, per EPA ID number IND064715907. *Ex. 10.*
7. Bud's 2002 Annual Manifest Report was submitted to IDEM on March 5, 2003, and prepared by Bruce Carter Associates, LLC, and signed by Bud's Tim Ginther. *Ex. 12.* Bud's 2002 Annual Manifest Reports contain Bud's EPA Generator number IND064715907, the notification forms and off-site shipping forms. *Id.* The off-site shipping forms state the quantity and types of hazardous waste shipped off-site, and the hazardous waste receiver. *Id.* Bud's 2002 Annual Manifest Reports state that Bud's was a Small Quantity Generator in 2002, and includes the manifest summary report for 4,576 pounds of hazardous waste in the form of bulked up solvents, inks and thinners, received by Essroc, transported by Liquid Waste Removal, Inc. *Id.*; *see also Ex. 11, p. 1.* 4,576 pounds per year generates an average of approximately 381 pounds per month.
8. Bud's January 29, 2002 Uniform Hazardous Waste Summary Report, from transporter Liquid Waste Removal, indicates that Bud's sent offsite 110 gallons, or 825 pounds, of hazardous waste in the form of Waste-paint related material. *Ex. 13.* And, other hazardous waste streams, (such as rags, and spent solvent reclaimed on-site), are not included calculating the amount of hazardous waste generated in 2002. *Id.*
9. Bud's January 29, 2002 EPA Uniform Hazardous Waste Manifest from transporter Liquid Waste Removal, Inc., shows that 440 gallons, or 3,300 pounds, of hazardous waste, in the form of waste paint-related material, was sent off-site by Bud's. *Ex. 14.*
10. The 2001 Annual Manifest Report, signed by Tim Ginther for Bud's, also states that Bud's was a Small Quantity Generator in 2001, and includes a manifest summary report for 2,673 pounds of hazardous waste received by Essroc, transported by Liquid Waste Removal, Inc. *Ex. 13.* In 2003, Essroc received 423 pounds of waste paint and auto body solvents from Bud's. *Ex. 11, p. 2.* Other hazardous waste streams, not included in the amounts Essroc received, include rags, and spent solvent reclaimed on-site. *Id.*

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11. IDEM Inspector Espich took photos at the Site during his inspection on July 23 and 24, 2002. *Ex. 15.*
12. Bud's Waste Containment Area is depicted in photos 1 through 6. *Ex. 15.* The Waste Containment Area is a concrete pad with block concrete walls. *Id.* Per Bud's Tim Ginther, the Waste Containment Area was later removed in 2005, showing a clean sand bottom and Styrofoam liner. In the Waste Containment Area, four 55-gallon containers are shown, with still bottoms (waste remaining after thinner is cooked to clean out and reuse solvent) stored longer than one year, in the containers on the right side of the photos. *Ex. 15, photos 1, 2, 3.* Used oil was in the black container. *Id.* Spent antifreeze is in the red container; the container labeled "WASTE" was empty. *Id.*
13. The bottom of the Waste Containment Area was cracked; test results from Bud's prior environmental consultant on the Waste Containment Area, showed that when filled, the Waste Containment Area drained in seven hours. Although the parties disputed whether the Waste Containment Area contained oil, substantial evidence supports the conclusion that hazardous waste, in the form of still bottoms and used oil, was released into the Waste Containment Area. *Ex. 15, photos 4, 5, 6.*
14. Bud's Paint Mix Area is shown in photos 7 and 8. *Ex. 15.* An open, unlabelled trash receptacle contained disposed rags contaminated with lacquer thinner. *Ex. 15, photo 7.* An open, unlabelled thirty-gallon trash container had disposed 5-gallon satellite accumulation of waste lacquer thinner. *Ex. 15, photo 8.*
15. Bud's Painting Area is shown in photos 9, 10, 11 and 12. *Ex. 15.* The Painting Area includes a gun washing station for cup guns, *Ex. 15, photo 9;* a gun washing station for gravity fed auto painting guns, *Ex. 15, photo 10;* gun washing stations and a spray booth, *Ex. 15, photo 11;* and a recycling unit for spent lacquer thinner, *Ex. 15, photo 12.*
16. Bud's sent some of its used oil to Elkhart Auto Center to be burned in a used oil space heater without determining whether the used oil was on-specification or off-specification.
17. After IDEM's July 23, 24, 2002 inspection, Inspector Espich referred Bud's to the IDEM Office of Enforcement. *Ex. 2a.* IDEM issued Bud's a Violation Letter on September 26, 2002. *Ex. 2b.*
18. IDEM's Office of Land Quality Section Chief, Nancy Johnston, testified that as for civil penalty, Bud's exhibited good faith cooperation concerning unpermitted hazardous waste, and removing waste from the Waste Containment Area.

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19. IDEM issued a Notice of Violation (“NOV”) on January 15, 2003. *Final Hearing Exs. 17, 18.* The NOV included an offer to enter into an Agreed Order (“AO”) per I.C. § 13-30-3-3. *Id.* IDEM and Respondent Bud’s participated in a settlement conference on March 3, 2003. On October 30, 2003, IDEM transmitted an amended NOV to Bud’s, which NOV contained an offer to enter into an AO. *Final Hearing Exs. 19; D.* Although the AO was revised in subsequent negotiations, the parties did not reach agreement on an AO.
20. On June 1, 2005, IDEM’s Commissioner issued a Notice and Order (“Commissioner’s Order” or “CO”) pursuant to I.C. § 13-30, *et seq.*, 329 IAC 13 and 329 IAC 3.1. *Petition for Administrative Review.* In summary, the CO stated that Bud’s did not comply with I.C. § 13-30, *et seq.*, and 329 IAC 13 and 329 IAC 3.1 because Bud’s did not make hazardous waste determinations for, and improperly transported and disposed, two waste streams of solvent contaminated rags and spray booth filters contaminated with lacquer thinner. *Id.* IDEM also asserted that Bud’s accumulated unpermitted waste in open containers, containers that were not properly labeled as hazardous waste or other descriptions of the contents. *Id.* Used oil was stored in unlabelled containers. *Id.* Still bottoms and used oil were released into Bud’s Hazardous Waste Containment Area; Bud’s did not properly respond to the release. *Id.*
21. The Commissioner’s Order required Bud’s to comply with I.C. § 13-30, *et seq.*, and 329 IAC 13 and 329 IAC 3.1, by correcting site violations and paying a civil penalty of \$47,750. *Id.* Bud’s, through counsel, timely filed a letter seeking administrative review (“Petition”) of the Commissioner’s Order on June 17, 2005.
22. A Final Hearing was conducted on August 12, 2008 and on September 22, 2008; Complainant IDEM submitted proposed findings of fact, conclusions of law and final order on December 8, 2008; Respondent Bud’s submitted a Post-Hearing Brief on December 10, 2008.

**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.
3. In this cause, IDEM has the burden of proof and persuasion. I.C. § 4-21.5-3-14(c).

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4. 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).
5. 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 IDEM's determination that Bud's waste product storage and disposal violated Indiana law, 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.*, 2005 OEA 26, 41.
6. On June 17, 2005, Bud's timely filed its Petition for Administrative Review of IDEM's June 1, 2005 Commissioner's Order. This matter proceeded to dispositive motions. OEA's decisions are incorporated by reference to this Final Order, including its August 2, 2007 Findings of Fact, Conclusions of Law and Order Denying Motion to Dismiss; August 6, 2008 Findings of Fact, Conclusions of Law and Order on Bud's Motion for Summary Judgment; August 7, 2008 Order Denying Motion to Dismiss. Also incorporated by reference is the Marion County, Indiana Superior Court's July 6, 2006 Order Granting Respondents' (IDEM) Motion to Dismiss Issues II and III of Petition and Denying Petitioners' (Bud's) Motion for Summary Judgment, Marion Superior Court 12, Civil Division, Cause Number 49F12-0602-MI-004973. Per email communications exchanged among the parties on October 9, 2009, OEA noted that it would issue this decision on October 13, 2009, due to computer problems.

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7. A generator of at least 100 kg (220 pounds) per month of hazardous waste is a small quantity generator of hazardous waste; hazardous waste generation at a smaller monthly amount is a conditionally exempt small quantity generator. 40 CFR 261.5(a) and 40 CFR 262, incorporated by reference at 329 IAC 3.1-6, *et seq.* At the time of the July 23 and 24, 2002 inspection, the amount of hazardous waste generated by Bud's subjected Bud's to the requirements for Small Quantity Generators as set forth in 40 CFR 262.
8. IDEM alleges that Respondent Bud's violated I.C. § 13-30-2-1(1), which provides, in pertinent part:

A person may not do any of the following:

  - (1) Discharge, emit, cause, allow, or threaten to discharge, emit, cause or allow any contaminant or waste, including any noxious odor, either alone or in combination with contaminants from other sources, into:
    - (A) the environment . . . in any form that causes or would cause pollution that violates or would violate rules, standards, or discharge or emission requirements adopted by the appropriate board under environmental management laws.
9. By substantial evidence, Bud's violated I.C. § 13-30-2-1(1) by allowing the release of hazardous waste still bottoms and used oil into Bud's Waste Containment Area, then into the environment through cracks in the Waste Containment Area.
10. IDEM alleges that Bud's violated I.C. § 13-30-2-1(12) which provides, in pertinent part:

A person may not do any of the following:

...

Cause or allow the transportation of a hazardous waste without a manifest if a manifest is required by law.
11. By substantial evidence, Bud's violated I.C. § 13-30-2-1(12) by sending hazardous waste rags and spray booth filters off-site without required hazardous waste manifests.
12. IDEM alleges that Bud's violated 329 IAC 13-3-2, which prohibits the use of used oil for energy recovery until the used oil has been analyzed and determined to be free of constituents above specified levels. By substantial evidence, Bud's violated 329 IAC 13-3-2 by providing Elkhart Auto Center with used oil to be burned in a used oil space heater, without determining in advance whether the used oil was on-specification or off-specification.
13. IDEM alleges that Bud's violated 329 IAC 13-4-3(d) which requires containers of hazardous waste to be labeled with the words "Hazardous Waste". By substantial evidence, Bud's violated 329 IAC 13-4-3(d) in its use of unlabeled containers of three 55-gallon containers of hazardous waste in its Waste Containment Area.

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14. IDEM alleges that Bud's violated 329 IAC 13-4-3(e), which requires used oil to be stored to prohibit releases, and if releases occur, to respond as specified. By substantial evidence, Bud's violated 329 IAC 13-4-3(e) by releasing used oil into its Waste Containment Area and not responding to the release as specified in 329 IAC 13-4-3-(e).
15. Substantial evidence supports IDEM's allegation that Bud's violated 329 IAC 3.1, per 40 CFR 262.11 (incorporated by reference), by not making hazardous waste determinations on solvent-contaminated rags and spray booth filters contaminated with lacquer thinner.
16. Substantial evidence supports IDEM's allegation that Bud's violated 329 IAC 3.1, per 40 CFR 262.34(c)(1)(i) (incorporated by reference), by Bud's open storage of two satellite accumulation containers (one five-gallon and one thirty-gallon) in the Paint Mix Area which held waste lacquer thinner.
17. Substantial evidence supports IDEM's allegation that Bud's violated 329 IAC 3.1, per 40 CFR 262.34(c)(1)(ii) (incorporated by reference), by not properly labeling one five-gallon satellite accumulation container of waste lacquer thinner with the words "Hazardous Waste".
18. Substantial evidence supports IDEM's allegation that Bud's violated 329 IAC 3.1, per 40 CFR 262.34(d)(4), referencing 40 CFR 262.34(a)(2) (incorporated by reference), by not marking the date that accumulation began on four 55-gallon containers of still bottoms, so that an accumulation date for hazardous waste could be determined.
19. Substantial evidence supports IDEM's allegation that Bud's violated 329 IAC 3.1, per 40 CFR 262.34(d)(4), referencing 40 CFR 262.34(a)(3) (incorporated by reference), by not labeling three 55-gallon containers with the words "Hazardous Waste".
20. Substantial evidence supports IDEM's allegation that Bud's violated 329 IAC 3.1, per 40 CFR 262.34(d), referencing 40 CFR 262.31 (incorporated by reference), by failing to properly manage waste stored in the Hazardous Waste Containment Area so as to minimize a release to the environment.
21. Respondent Bud's argues that the amount of time between the violation and the issuance of the Commissioner's Order should be considered. However, Bud's does not present any evidence that this lapse of time prejudiced it. The mere passage of time is insufficient, without a showing of prejudice, to convince the Court that Bud's should not be found in violation.
22. Bud's argues that the Commissioner's Order demands the impossible task of determining if releases of contaminants to the soil or groundwater resulted from the released waste on the site. The applicable regulations do not afford the Court the flexibility to eliminate a duty to comply with applicable law. Bud's is subject to the requirements of a site assessment, to be based upon the principles outlined within IDEM's February 15, 2001 Risk Integrated System of Closure ("RISC") Technical Resource Guidance Document, and to include all items listed in para. 13 of the Order portion of the Commissioner's Order.



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23. IDEM may elect to use its Civil Penalty Policy<sup>2</sup> to determine the appropriate penalty in this matter. This policy was adopted pursuant to I.C. § 13-14-1-11.5 and may be used as a nonrule policy document in accordance with this statute. Also, the Court of Appeals, in *IDEM v. Schnippel Construction Inc.*, 778 N.E.2d 407 (Ind. Ct. App. 2002), approved of the ELJ's use of the General Policy in calculating the civil penalty. Therefore, it is acceptable to use the General Policy as the basis for calculating a civil penalty.
24. According to this policy, a civil penalty is calculated for each violation 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.
25. Several violations of I.C. § 13-30-2-1(3), I.C. § 13-30-2-1(1), I.C. § 13-30-2-1(12), 329 IAC 13-3-2, 329 IAC 13-4-3(a), 329 IAC 13-4-3(d), 329 IAC 13-4-3(e), and 329 IAC 3.1 have been proven by substantial evidence, but group into (1) violations concerning hazardous waste characterization, (2) improper disposal of rags and filters, (3) release to the environment, and (4) container management. The ELJ concludes that four violations shall be utilized.
26. The policy states that the potential for harm may be determined by considering “the likelihood and degree of exposure of persons 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.
27. The ELJ concludes that the potential for harm is moderate. No evidence was presented that actual harm has occurred. When the concrete pad at Waste Containment Area was removed, clean sand was left, but off-site migration has not been determined.
28. The extent of deviation relates to the degree to which the requirement is violated. In this case, Respondent Bud's significantly deviated from the requirements of several regulations when it improperly disposed of hazardous waste, failed to characterize or manage used oil, and failed to label items. However, given the size of the Site, the lack of any information regarding the initial releases lessens the extent of deviation, and the fact that Bud's complied with some regulations, the ELJ concludes that the extent of deviation is moderate.

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<sup>2</sup> IDEM's Civil Penalty Policy is a nonrule document, ID No. Enforcement 99-0002-NPD, originally adopted on April 5, 1999 in accordance with I.C. § 13-14-1-11.5.

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29. In accordance with the Civil Penalty policy, IDEM is authorized to assess civil penalties of up to \$25,00 per day of any violation, I.C. § 13-30-4-1, but generally calculates multi-day penalties in the case of continuing violations that demonstrate a major potential for harm and/or a major extent of deviation, but may be calculated for other continuing violations. Technically, the Respondent has been out of compliance since before the July 23 and 24, 2002 site inspections. There is no question that the Respondent has known that a release occurred at the Site since 2003 (the date that IDEM notified them of the obligation to conduct an ISC) or, at the very latest, 2007 when IDEM provided the more detailed information. However, the ELJ found that the potential for harm and extent from deviation were each moderate. The Days of Noncompliance Multiplier is properly 1.
30. The IDEM produced no evidence that either mitigating or aggravating circumstances were considered or that it calculated any economic benefit.
31. According to the Civil Penalty Policy, a value is selected within a cell per the judgment of staff and is based on the individual circumstances of each case, to establish the base penalty. This value may be adjusted by aggravating or mitigating factors. The ELJ finds neither aggravating nor mitigating factors to consider. Mr. Ginther's testimony was that the material was a waste stream from which Bud's received little profit and that his business had a modest profiting. Therefore, Respondent received no economic benefit from its violation.
32. For (1) violations concerning hazardous waste characterization, the ELJ concludes that a moderate potential for harm, with a moderate extent of deviation. With no aggravating or mitigating circumstances, but numerous violations, the ELJ finds a civil penalty of Ten Thousand Dollars (\$10,000).
33. For (2) improper disposal of rags and filters, the ELJ concludes that a moderate potential for harm, with a moderate extent of deviation. With no aggravating or mitigating circumstances, but numerous violations, the ELJ finds a civil penalty of Ten Thousand Dollars (\$10,000).
34. For (3) release to the environment, the ELJ concludes that a moderate potential for harm, with a moderate extent of deviation. With no aggravating or mitigating circumstances, and with substantial evidence supporting a modest amount of volume, the ELJ finds a civil penalty of Seven Thousand Five Hundred Dollars (\$7,500).
35. For (4) container management, the ELJ concludes that a minor potential for harm, with a minor extent of deviation. With no aggravating or mitigating circumstances, but numerous violations, the ELJ finds a civil penalty of Three Thousand Five Hundred Dollars (\$3,500).
33. Therefore, the ELJ concludes after a *de novo* review, that the proper penalty is \$31,000 (thirty-one thousand dollars), and the June 1, 2005 Commissioner's Order is sustained in all other respects.

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**FINAL ORDER**

For all of the foregoing reasons, **IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that the Respondent, Bud's Body Shop, Inc., violated I.C. § 13-30-2-1(3), I.C. § 13-30-2-1(1), I.C. § 13-30-2-1(12), 329 IAC 13-3-2, 329 IAC 13-4-3(a), 329 IAC 13-4-3(d), 329 IAC 13-4-3(e), and 329 IAC 3.1. Respondent, Bud's Body Shop, Inc. is subject to civil penalties of Thirty-One Thousand Dollars (\$31,000.00) for violating Indiana's environmental management laws and water pollution control laws. The Indiana Department of Environmental Management's June 1, 2005 Commissioner's Order is **AFFIRMED** in all other respects.

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 13th day of October, 2009, in Indianapolis, IN.**

Hon. Mary L. Davidsen  
Chief Environmental Law Judge