

Commissioner, Indiana Department of Environmental Management, Complainant,
v.
Baker Oil Company, d/b/a Johnny Hall-Mar, Inc.,
UST Facility No. 8407,
Paoli, Orange County, Indiana
2011 OEA 106, (09-S-E-4308)

OFFICIAL SHORT CITATION NAME: When referring 2011 OEA 106 this case site as
Baker Oil Company, 2011 OEA 106.

TOPICS:

leaking underground storage tank (LUST)	cathodically protected tank impressed current records	major potential for harm days of noncompliance
underground storage tank (UST)	broken equipment records	base civil penalty
legal entity	automatic tank gauge and leak detection	aggravating factors
Secretary of State	line leak detection	mitigating factors
suspected petroleum release	Notice of Violation	329 IAC 9-2-1
petroleum spill	Agreed Order	329 IAC 9-3-1(b)(1), (2)
Initial Site Characterization (ISC)	Notice and Order of the Commissioner	329 IAC 9-3.1-2, (3)
hose leak	Civil Penalty Policy, Doc. 99-0002-NPD	329 IAC 9-3.1-4(b)(7)
petroleum staining	UST/LUST Civil Penalty Policy, Doc. 99-0001-NPD	329 IAC 9-4-1
concrete	inability to pay	329 IAC 9-4-3(2)
asphalt	Notice of Bankruptcy	329 IAC 9-4-4
Violation Letter	pro se litigants	329 IAC 9-5-2
Release Investigation and Confirmation Steps	major extent of deviation	329 IAC 9-5-5.1(a)
corrosion protection		329 IAC 9-7-5(2)
		I.C. § 13-23-1-2
		I.C. § 13-23-14-2, -3

PRESIDING JUDGE:

Mary L. Davidsen

PARTY REPRESENTATIVES:

IDEM: Justin D. Barrett, Esq.
Respondent: John M. Baker and Stacy Baker, pro se

ORDER ISSUED:

August 26, 2011

INDEX CATEGORY:

Land

FURTHER CASE ACTIVITY:

[none]

STATE OF INDIANA)
)
COUNTY OF MARION)

BEFORE THE INDIANA OFFICE
OF ENVIRONMENTAL ADJUDICATION

IN THE MATTER OF:)

COMMISSIONER, INDIANA DEPARTMENT OF)
ENVIRONMENTAL MANAGEMENT,)
Case Nos. 2006-15985-S, 2006-16478-S)
Complainant,)

v.)

Cause No. 09-S-E-4308

BAKER OIL COMPANY, d/b/a)
JOHNNY HALL-MAR, INC.,)
UST Facility No. 8407)
PAOLI, ORANGE COUNTY, INDIANA,)
Respondent)

FINDINGS OF FACT, CONCLUSIONS OF LAW and FINAL ORDER

This matter came before the Office of Environmental Adjudication (“OEA” or “Court”) on final hearing as to whether Indiana environmental laws were violated such that penalties should be assessed against Respondent Baker Oil Company, d/b/a Johnny Hall-Mar, Inc. at a gas station facility at 303 East Main Street, Paoli, Orange County, Indiana. The Chief Environmental Law Judge (“ELJ”) having considered the petition, testimony, evidence, and pleadings of the parties, now finds that judgment may be made upon the record. The Chief ELJ, by substantial evidence, and being duly advised, now makes the following findings of fact and conclusions of law and enters the following Final Order:

FINDINGS OF FACT

1. At all times noted in this Final Order, Respondent Baker Oil Company, d/b/a Johnny Hall-Mar, Inc. (“Baker Oil” or “Respondent”) operated underground storage tank systems at gas station facilities, including the facility which is the subject of this administrative cause. This case concerns underground storage tank (UST) facility I.D. number 8407 located at 303 East Main Street, Paoli, Orange County, Indiana (“Site”). *Complainant IDEM’s Ex. 1*. A 1986 IDEM Notification for Underground Storage Tank form for four USTs at the Site was signed by Respondent John Baker, as owner or owner’s authorized representative of Baker Oil Co. *Respondent Baker Oil’s Ex. C*. Stacy Baker testified that this cause concerns Baker Oil Company, and not Johnny-Hall-Mar, Inc. Baker Oil Company’s legal entity name with the Indiana Secretary of State is Johnny Hall-Mar, Inc.; Registered Agent is Stacy L. Baker, Principals are John and Stacy Baker. By substantial evidence, Respondent is liable as operator for the Site.

2. As part of his job duties, Indiana Department of Environmental Management (“IDEM”) Office of Land Quality/Leaking Underground Storage Tank Section Project Manager Douglas Bartz inspected Respondent’s Site when a petroleum spill was reported to IDEM by Orange County Emergency Management on March 11, 2002. *IDEM Ex. 4.*
3. On March 25, 2002, April 23, 2003, and February 8, 2006, Project Manager Bartz sent letters to Baker Oil requesting that Baker Oil perform an Initial Site Characterization (“ISC”) of the Site, and perform other specified measures, in order to bring the Site into compliance with applicable UST regulations. *IDEM Exs. 5, 6, 7.* These letters were sent via certified mail, and were received by Baker Oil. *Id.* The letters, and further Site visits with Baker Oil were part of IDEM’s attempts to cooperate with Baker Oil to achieve compliance without initiating a formal IDEM enforcement action against Baker Oil.
4. On July 15, 2006, as part of his job duties, IDEM Emergency Response Section Inspector Mike Sutton responded to a petroleum spill report based on a complaint made to IDEM by Orange County Emergency Management. *IDEM Ex. 8.*
5. Baker Oil did not dispute that a spill occurred, but presented testimony that it was a small surface spill caused by a pinhole-sized leak in a hose, and was thus not required to be reported. Baker Oil stated that some curb wall and facility staining was due to mold, not petroleum product. Baker Oil also presented opinion testimony that underground free product is present in Paoli, but that Baker Oil is not the source. Inspector Sutton’s testimony provided substantial evidence that the Site’s concrete drive and nearby asphalt street had a significant amount of petroleum staining. *IDEM Exs. 12A – 12F; Baker Oil Ex. E.* Photographs of the Site showed that the asphalt was degrading from long-term exposure to hydrocarbons in free product (released) petroleum. *Id.* Petroleum had seeped through cracks in the pavement near the diesel dispenser island, indicating that a subsurface release had occurred. *Id.* The Site was a Leaking Underground Storage Tank (“LUST”) Site.
6. On July 20, 2006, as part of his job duties, IDEM Office of Land Quality/LUST Section Chief Craig Schroer issued a Violation Letter to Respondents for their failure to report a confirmed release within 24 hours of release confirmation, as well as noting pending violations, and opportunities to remedy the failures by submitting an Initial Abatement Measures Report and a Free Product Removal Report. *IDEM Ex. 9.* The Violation Letter further addressed failure to conduct and report an ISC within 30 days of receipt of the Violation Letter. *Id.* The Violation Letter was received via certified mail on July 25, 2006. *Id.*
7. Baker Oil did not respond to the July 20, 2006 letter, nor did it submit reports of the petroleum release as required in 329 IAC 9-4-1 and 329 IAC 9-5-2, which is specified as a violation of 329 IAC 9-3-1(b)(2). Baker Oil did not confirm the suspected petroleum release as required in 329 IAC 9-4-1, which is specified as a violation of 329 IAC 9-5-5.1(a).

8. On July 24, 2006, Project Manager Bartz' Release Investigation and Confirmation Steps letter to Baker Oil summarized Inspector Sutton's findings, and reiterated a respondent's statutory obligations for suspected UST releases. *IDEM Ex. 10*. Baker Oil received IDEM's certified letter on July 27, 2006. *Id.* Baker Oil did not submit a report of the suspected releases, confirm the suspected release, or submit the initial response information.
9. Project Manager Bartz presented factors, including the Site's topography and sub-pavement petroleum seepage, which establish, by substantial evidence, that the Site is a LUST Site.
10. Site inspections were conducted on November 29, 2005, March 9, 2006, May 31, 2006 and July 19, 2006 by IDEM Office of Land Quality/Compliance and Response Branch Inspector Joseph Stapinski. *IDEM Exs. 13, 14, 15, 16*.
11. Stacy Baker's Proposed Findings of Fact, Conclusions of Law and Order state that its records were maintained in notebooks at 702 North Maple St., Orleans, Orange County, Indiana, and were available during business hours or were faxed on request. However, at hearing, Respondent Baker Oil admitted that various required UST records were not provided to IDEM inspectors nor submitted to IDEM by mail. Inspector Stapinski's four Site inspections provided substantial evidence that:
 - a. Baker Oil failed to install appropriate corrosion protection and maintain impressed current records for the UST system as described in 329 IAC 9-3.1-2(3) and 329 IAC 9-3.1-2, in violation of 329 IAC 9-2-1(1)(B);
 - b. Baker Oil failed to submit appropriate corrosion protection and maintain impressed current records for the UST system, as described in 329 IAC 9-3-1(b)(12);
 - c. Baker Oil did not maintain records of repairs and broken equipment (hoses, etc.), as described in 329 IAC 9-3.1-4(b)(7);
 - d. Baker Oil failed to maintain automatic tank gauge and leak detection, as addressed in 329 IAC 9-7-4(4); and
 - e. Baker Oil failed to maintain line leak detection, as described in 329 IAC 9-7-5(2).
12. On September 7, 2007, Section Chief Schroer issued a Violation Letter which Baker Oil received via certified mail on September 14, 2007. *IDEM Ex. 11*. The September 7, 2007 Violation Letter noted that Baker Oil did not respond to the July 20, 2006 Violation Letter, and informed Baker Oil that continued noncompliance would result a referral of the case to IDEM's Office of Enforcement. *Id.*
13. Baker Oil stated that it was in compliance, and responded to IDEM's request. Baker Oil's testimony also disputed specific inspection dates, but was controverted by records presented into evidence.
14. On July 27, 2007, IDEM issued Baker Oil a Notice of Violation ("NOV") per I.C. § 13-30-3-3; Baker Oil received the NOV via certified mail on July 30, 2007. *IDEM Ex. 18*. The NOV cited Baker Oil for eight violations: 329 IAC 9-2-1(1)(B), 329 IAC 9-3-1(b)(12), 329 IAC 9-3-1(b)(2), 329 IAC 9-3.1-4(b)(7), 329 IAC 9-4-3(2), 329 IAC 9-5-5.1(a), 329 IAC 9-7-4(4) and 329 IAC 9-7-5(2). *Id.*

15. Inspector Stapinski's September 4, 2008 Site inspection provided substantial evidence that the Baker Oil Site continued in noncompliance. *IDEM Ex. 17*.
16. The parties did not enter into an Agreed Order. On September 10, 2009, IDEM issued Baker Oil a Notice and Order of the Commissioner of the Department of Environmental Management ("Commissioner's Order" or "CO"). *IDEM Exs. 1, 2*. The CO required Baker Oil to comply with applicable UST regulations and to take appropriate compliance actions, such as permanently closing the UST system, performing an Initial Site Characterization Plan ("ISC"), and implementing a Corrective Action Plan ("CAP"). *Id.* The CO also imposed a Civil Penalty of Thirty Nine Thousand Four Hundred Dollars (\$39,400), to be paid to IDEM within thirty (30) days. *Id.*
17. In its April 9, 2010 Proposed Findings of Fact, Conclusions of Law and Final Order, IDEM stated that its civil penalty calculations were made per IDEM's Civil Penalty Policy Non-rule Policy Document (Doc. 99-0002-NPD)¹ and the UST/LUST Civil Penalty Policy (Doc. 99-0001-NPD) for the eight violations, and determined that conditions at the Site created a major potential for harm of petroleum spills and major deviations from UST regulations. IDEM's civil penalty calculations further considered Baker Oil's struggling financial situation in mitigating its calculation. IDEM identified aggravating factors of its multiple attempts over several years to cooperate with Baker Oil to bring the Site into compliance, the continuous noncompliance, the number of years which have elapsed since IDEM first discovered the violations, and the economic benefit Baker Oil enjoyed by not bringing the Site into compliance.
18. IDEM's civil penalty calculation seems to be based on attributing one tank for the Site, although four were registered. In her Proposed Findings, Stacy Baker states that a leaking tank no longer contains product, although no evidence was presented that any tank was closed in compliance with applicable regulations.
19. In seeking to lower or eliminate assessment of a civil penalty, Respondent Baker Oil presented substantial evidence that tragic personal family and business matters affected its ability to pay, and that it had no ability to pay. At the final hearing setting, Stacy Baker stated that Baker Oil had filed a Chapter 7 bankruptcy.
20. Baker Oil did not provide IDEM or the Court further evidence of its inability to pay the civil penalties, such as tax returns or corporate financial statements.
21. This cause is the subject of Respondent Baker Oil's timely October 6, 2009 Petition for Administrative Review of the Commissioner's Order. The matter proceeded to Final Hearing on March 18, 2010.

¹ IDEM's Civil Penalty Policy, ID No. Enforcement 99-0002-NPD, and its UST/LUST Civil Penalty Policy ID No. Enforcement 99-0001-NPD, *IDEM Ex. R*, were both originally adopted on April 5, 1999 in accordance with I.C. § 13-14-1-11.5. As both apply to the violations in this cause, they will be referred to collectively as the "civil penalty policies".

22. Final hearing was conducted on March 18, 2010. Witnesses were sworn and evidence was presented. During the course of this proceeding, IDEM was represented by legal counsel Justin D. Barrett, Esq. Baker Oil's representation was provided by Stacy Baker, who did not have legal counsel.
23. During the Final Hearing, Baker Oil witness Stacy Baker stated that Respondent had filed Bankruptcy, and repeatedly noted that a notice of the bankruptcy filing was to be received imminently. On March 15, 2010, the Court received a Suggestion of Bankruptcy filing (Chapter 7) of January 21, 2010 from legal counsel for Stacy Baker, which Suggestion was the subject of IDEM's Motion to Strike as filed after the evidentiary record closed in this cause. On April 8, 2010, the Court issued a scheduling order providing until April 16, 2010 for the parties to submit a memorandum of law on Court's authority to proceed with this Cause, in light of March 15, 2010 Notice of Suggestion of Bankruptcy of Stacy Baker. The parties did not file further documents addressing the Suggestion. The Court did not receive any further filings or documents concerning the Suggestion, such any of the Petition schedules, a notice that this matter was listed on the Bankruptcy petition, any Motions or Orders concerning the Automatic Stay, nor further disposition of the bankruptcy.

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.*, and per I.C. § 4-21.5.3.7(a)(1)(A).
2. Without an order from a bankruptcy court of competent jurisdiction to the contrary, the Suggestion of Stacy Baker's Chapter 7 Bankruptcy does not limit this Court's jurisdiction over Baker Oil.
3. 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.
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. *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). "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.
6. During this proceeding, Baker Oil was not represented by legal counsel, sometimes referred to as proceeding pro se. "While a party may decide to proceed without legal representation, "[i]t is well established that pro se litigants are held to the same standard as are licensed lawyers. *Goosens v. Goosens*, 829 N.E.2d 36, 43 (Ind. Ct. App. 2005). The Court must and will hold each party to the same standard of legal competence, whether represented by counsel.
7. 329 IAC 9-2-1(1)(B) provides that in order to prevent releases due to structural failure, corrosion or spills and overflows for as long as the UST system is used to store regulated substances, all owners and operators of new UST systems shall meet the following requirements: Each tank must be properly designed and constructed, and any portion underground that routinely contains product must be protected from corrosion as specified as follows: The tank is constructed of steel and cathodically protected. A cathodically protected tank must be inspected and tested periodically as stated in 329 IAC 9-3.1-2(3). Impressed current records are required to be maintained. 329 IAC 9-3.1-2. By substantial evidence, Baker Oil failed to install the appropriate corrosion protection and maintain impressed current records for the UST systems as required in 329 IAC 9-3.1-2(3) and 329 IAC 9-3.1-2, in violation of 329 IAC 9-2-1(1)(B).
8. 329 IAC 9-3-1(b)(12) requires UST owners and operators to submit the following to IDEM: documentation of operation and maintenance of corrosion protection equipment under 329 IAC 9-3.1-2; the results of post-installation cathodic protection: (A) test for a galvanic cathodic protection system; and (B) inspection for an impressed current cathodic protection system, all to be submitted within 30 days after the test or inspection is completed for a new UST system and an upgraded UST system. By substantial evidence, Baker Oil failed to submit the appropriate corrosion protection and maintain impressed current records for the UST systems as required in 329 IAC 9-3.1-2, in violation of 329 IAC 9-2-1(1)(B).

9. 329 IAC 9-3-1(b)(2) requires UST owners and operators to submit to IDEM reports of all releases, including (A) suspected releases under 329 IAC 9-4-1, (B) spills and overflows under 329 IAC 9-4-4, and (C) confirmed releases under 329 IAC 9-5-2. By substantial evidence, Baker Oil failed to submit reports of releases required under 329 IAC 9-4-1, 329 IAC 9-4-4 and 329 IAC 9-5-2, in violation of 329 IAC 9-3-1(b)(2).
10. 329 IAC 9-3.1-4(b)(7) requires UST owners and operators to maintain operating records of each repair for the remaining operating life of the UST system, which records demonstrate compliance with this requirement. Maintenance must be documented, but is not required to be submitted to IDEM. By substantial evidence, Baker Oil failed to maintain records of repairs and broken equipment, such as hoses, in violation of 329 IAC 9-3.1-4(b)(7).
11. 329 IAC 9-4-3(2) requires UST owners and operators, unless corrective action is initiated per 329 IAC 9-5, to immediately investigate and confirm all suspected releases of regulated substances requiring reporting under sec. 1 of the rule within seven days using the following steps or another procedure approved by the IDEM Commissioner: The owner and operator shall measure for the presence of a release when the contaminant is most likely to be present at the UST Site. In selecting sample types, sample locations, and measurement methods, the owner and operator shall consider the nature of the stored substance, the type of initial alarm or cause for suspicion, the type of backfill, the depth of groundwater, and other factors appropriate for identifying the presence and source of the releases. The owner and operator shall complete one of the following: (A) if the test results for the excavation zone or the underground storage site indicate that a release has occurred, the owner and operator shall begin corrective action per 329 IAC 9-5; (B) if the test results do not indicate that a release has occurred, then further investigation is not required. By substantial evidence, Baker Oil failed to confirm a suspected release per 329 IAC 9-4-1, in violation of 329 IAC 9-4-3(2).
12. 329 IAC 9-5-5.1(a), in accord with I.C. § 13-12-3-2, requires UST owners and operators to assemble information about the Site and nature of the release, including information gained while confirming the release or completing initial response and abatement measures stated in the rule's sections 2 and 3.2. By substantial evidence, Baker Oil failed to submit the initial response information, in violation of 329 IAC 9-5-5.1(a).
13. 329 IAC 9-7-4(4) requires that equipment for automatic tank gauging that tests for the loss of product and conducts inventory control must meet the following requirements: (A) the automatic product level monitor test can detect a two-tenths (0.2) gallon per hour leak rate from any portion of the tank that routinely contains product; (B) inventory control, or another test of equivalent performance, is conducted per rule subdivision (1). By substantial evidence, Baker Oil failed to maintain automatic tank gauge and leak protection, in violation of 329 IAC 9-7-4(4).
14. 329 IAC 9-7-5(2) requires periodic line tightness test of piping, and must be able to detect a one-tenth (0.1) gallon per hour leak rate and one and one-half (1 1/2) times the operating pressure. By substantial evidence, Baker Oil failed to maintain line leak detection, in violation of 329 IAC 9-7-5(2).

15. IDEM met its the burden of showing, by substantial evidence, that Baker Oil is liable for civil penalties at the Site for the following:
- (a) failing to install the appropriate corrosion protection and maintain impressed current records for the UST systems as required in 329 IAC 9-3.1-2(3) and 329 IAC 9-3.1-2, in violation of 329 IAC 9-2-1(1)(B).
 - (b) failing to submit the appropriate corrosion protection and maintain impressed current records for the UST systems as required in 329 IAC 9-3.1-2, in violation of 329 IAC 9-2-1(1)(B).
 - (c) failing to submit reports of releases required under 329 IAC 9-4-1, 329 IAC 9-4-4 and 329 IAC 9-5-2, in violation of 329 IAC 9-3-1(b)(2).
 - (d) failing to maintain records of repairs and broken equipment, such as hoses, in violation of 329 IAC 9-3.1-4(b)(7).
 - (e) failing to confirm a suspected release per 329 IAC 9-4-1, in violation of 329 IAC 9-4-3(2).
 - (f) failing to submit the initial response information, in violation of 329 IAC 9-5-5.1(a).
 - (g) failing to maintain automatic tank gauge and leak protection, in violation of 329 IAC 9-7-4(4).
 - (h) failing to maintain line leak detection, in violation of 329 IAC 9-7-5(2).
16. Respondent Baker Oil is subject to civil penalties for violating Indiana’s underground storage tank laws. “A person who violates a rule adopted under IC 13-23-1-2 . . . is subject to a civil penalty of not more than ten thousand dollars (\$10,000) per underground storage tank for each day of violation.” I.C. § 13-23-14-2, -3. 329 IAC 9, *et seq.*, was adopted per I.C. § 13-23-1-2. Baker Oil violated underground storage tank rules stated in 329 IAC 9, *et seq.*, and is therefore subject to civil penalties for the violations. Civil penalty calculation should fulfill “the stated purpose of the Environmental Management Act . . . ‘to preserve, protect, and enforce the quality of the environment so that, to the extent possible, future generations will be ensured clean air, clean water, and a healthful environment.’” *IDEM v. Medical Disposal Services, Inc.*, 729 N.E.2d 577, 582 (Ind. 2000).
17. IDEM’s Civil Penalty Policy Non-rule Policy Document (Doc. 99-0002-NPD)² and the UST/LUST Civil Penalty Policy (Doc. 99-0001-NPD), are reasonable means of determining the civil penalty because they allows for predictable, consistent and fair calculation of penalties. *Commissioner, Ind. Dep’t of Env’tl Mgmt. v. Carson Stripping, Inc. and Carson Laser, Inc.*, 2004 OEA 14, 26, *citing 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). The two policies are applied together in violation cases involving UST/LUST matters. *Commissioner, Ind. Dep’t of Env’tl Mgmt. v. McClure Oil Corp.*, 2009 OEA 126, 129. UST civil penalty calculations are based on a review of each involved underground storage tank for each day of violation. I.C. § 13-23-14-2, -3. The civil penalty sought by IDEM was based on Baker Oil’s major deviations from the rules and major risk for the

² IDEM’s Civil Penalty Policy, ID No. Enforcement 99-0002-NPD, and its UST/LUST Civil Penalty Policy ID No. Enforcement 99-0001-NPD, were both originally adopted on April 5, 1999 in accordance with I.C. § 13-14-1-11.5. As both apply to the violations in this cause, they will be referred to collectively as the “civil penalty policies”.

potential harm, on the fact that the violations were documented over multiple inspections. Per the UST/LUST Penalty Policy, Sec. II, violations continuing for longer than 365 days to a day for each year. In this instance, the violations were first noted on March 11, 2002, and evidence was last presented to the Court at Final Hearing on March 18, 2010, for a total of eight (8) years, constituting eight violation “days”. *s. P, R.* The total civil penalty of \$39,400 penalty sought by IDEM did not result in a penalty exceeding the statutory maximum of \$10,000 per tank per day.

18. The record in this cause contains substantial evidence for the Court to apply the Civil Penalty Policies to determine the appropriate penalty in this matter. According to the policies, 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.
19. The policies state 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. OEA allocation of potential for harm, for extent of deviation, and for the matrix range point, is fact-sensitive. For example, in *McClure Oil*, 2009 OEA 126, a petroleum release from an UST was deemed a minor potential for harm, based on lack of evidence that the release had migrated off-site. In *Landers*, 2009 OEA 109, violations based on a large quantity of construction waste were deemed to constitute a moderate extent of deviation, and the penalty was selected from middle of the matrix range. In *Scherb*, 2006 OEA 16, violations based on a manure spill from a confined feeding operation into a stream resulted in moderate/moderate, and the lowest matrix amount was selected. In *IDEM v. Great Barrier Insulation Co.*, 2005 OEA 57, violations based on asbestos containment on removal with a low possibility of human or environmental contact and little adverse effect to the program, the Court selected minor potential for harm and a minor deviation, with the lowest point in the matrix applied.
20. For the violations of 329 IAC 9-2-1(1)(B), 329 9-3-1(b)(12), 329 IAC 9-3-1(b)(2), 329 IAC 9-3.1-4(b)(7), 329 IAC 9-4-3(2), 329 IAC 9-5-5.1(a), 329 IAC 9-7-4(4) and 329 IAC 9-7-5(2) at the Site, the potential for harm is major. Much of the system subject to monitoring is not within view, as it is either underground or is covered. Without required periodic monitoring, reporting and annual testing, the only releases which would reasonably be detected would be from emergency or catastrophic causes. Equipment problems or more routine equipment failures would not be detected, allowing for releases of fuel products which would cause harm to the environment. By substantial evidence, the UST system has leaked. Twice, Orange County Emergency Management and IDEM responded to releases. The potential for harm in the event of a release is significant, as the Site is in a populated area. The lack of documentation from periodic testing and reporting, in and of itself, creates no likelihood of exposure to harmful substances, but noncompliance with the testing and

reporting requirement eliminates a reasonable opportunity for Respondent Baker Oil or IDEM to determine whether equipment is operating properly or failing, and to respond appropriately.

21. The extent of deviation for the violations of is major. Required monitoring and reporting was either not done, not made available to IDEM as required, and not corrected over time. From UST tank and line testing to routine maintenance and suspected release reporting, no evidence was presented that Respondent Baker Oil complied with the regulations, over a period of eight years. During the eight years, no evidence was presented that Baker Oil attempted to communicate about Site conditions, or bring them into compliance. Respondent Baker Oil made the economic decision not to comply. The applicable requirements for performing and reporting required monitoring and testing contain no exception for the Court to apply. Little or no documentation was available at the Site. Deficiencies were not cured during the litigation of this case. The extent of deviation from 329 IAC 9-2-1(1)(B), 329 9-3-1(b)(12), 329 IAC 9-3-1(b)(2), 329 IAC 9-3.1-4(b)(7), 329 IAC 9-4-3(2), 329 IAC 9-5-5.1(a), 329 IAC 9-7-4(4) and 329 IAC 9-7-5(2) is major.
22. According to the Civil Penalty Policy, a value for each tank is selected from a selected cell “is left to the judgment of enforcement staff and is based on the individual circumstances of each case.” On *de novo* review of a case before the OEA, such judgment is to be exercised by the presiding environmental law judge (“ELJ”), to determine the base penalty. In this case, the circumstances show that Respondent Baker Oil’s experience in the field of gas station/UST facility operations and numerous contacts with IDEM should have apprised it of the required testing and documentation deficiencies for the facility. The Court recognizes that Respondent Baker Oil’s resources were limited due to various distressing business and personal family challenges during the pendency of this case. In this case, Respondent Baker Oil elected to make business decisions which gave greater support to its investments than to expenditures required for compliance with environmental regulations protective of the environment, public health and safety. Therefore, the ELJ finds that the low end of the range for a UST violation of major potential for harm and major extent of deviation (“Major/Major”) is appropriate, resulting in a penalty of Ten Thousand Dollars (\$10,000.00) per violation day at the Site.
23. The next step in civil penalty calculation is a determination of the days of noncompliance. IDEM investigations provide substantial evidence that violations were observed from March 11, 2002, and evidence was presented that the Site was still in noncompliance as of the March 18, 2010 final hearing, a period extending beyond 365 days. Therefore, by substantial evidence, noncompliance extended beyond 365 days for each of the eight violations. In this case, the Court elects to include its calculation of days of annual noncompliance within the days calculated for failure to comply with each of the violations (somewhat akin to concurrent, versus consecutive, sentencing done by in misdemeanor and felony sentencing). The UST Civil Penalty Policy provides a multiplier of eight (8) for over 365 days of noncompliance, for a base civil penalty of Eighty Thousand Dollars (\$80,000.00) for the Site.

24. Substantial evidence did not support a finding that the violations did or did not apply to more than one tank, although the facility was registered for four tanks. Without substantial evidence that the violations applied to more than one tank, the Court will not extend civil penalties to Respondent Baker Oil for more than one tank. By substantial evidence, the one tank is subject to the base civil penalty of \$80,000, for a base civil penalty for each tank of \$80,000.
25. The base civil penalty value may be adjusted by aggravating or mitigating factors. The mitigating factor of "Quick Settlement" did not occur, as Respondent Baker Oil did not execute a settlement in this case. Although the parties urge the ELJ to find aggravating or mitigating factors to consider, substantial evidence does not support the factors presented to the ELJ. The types of evidence of economic benefit, or of inability to pay, contemplated in the civil penalty policies provide a more reliable analytical base than the assertions offered by the parties. Neither party presented substantial evidence of economic benefit, inability to pay or aggravating or mitigating factors. For lack of substantial evidence, the Court finds no further adjustment to the base civil penalty.
26. Respondent Baker Oil Company, d/b/a Johnny Hall-Mar, Inc., with a gas station at 303 East Main Street, Paoli, Orange County, Indiana is assessed a total civil penalty of Eighty Thousand Dollars (\$80,000) for failure to install appropriate corrosion protection and maintain impressed system records, for failure to submit such records and release reports, for failure to maintain records of repairs and broken equipment, for failure to confirm a suspected release, for failure to submit initial release response information, for failure to maintain automatic tank gauge and leak detection, and for failure to maintain line leak detection, all in violation of 329 IAC 9-2-1(1)(B), 329 IAC 9-3-1(b)(12), 329 IAC 9-3-1(b)(2), 329 IAC 9-3.1-4(b)(7), 329 IAC 9-4-3(2), 329 IAC 9-5-5.1(a), 329 IAC 9-7-4(4) and 329 IAC 9-7-5(2), as adopted per I.C. § 13-23-1-2, and the September 10, 2009 Commissioner's Order is sustained in all other respects.
27. In its Proposed Findings of Fact, Conclusions of Law and Order, IDEM further sought specific actions to take place at the Site. The Court finds good cause for imposition of the following remedies sought by IDEM:
 - a. Respondent shall permanently close the UST system as follows:
 1. close the UST systems within sixty (60) days in accordance with the requirements of 329 IAC 9-6-1 through 329 IAC 9-6-4, including the applicable requirements for corrective action under 329 IAC 9-5-1 through 9-5-8; and
 2. Submit a UST Closure Report in accordance with 329 IAC 9-6-2.5 within thirty (30) days of closing the UST system;
 - b. Within sixty (60) days, Respondent shall comply with 329 IAC 9-5-5.1. Specifically, Respondent shall submit an Initial Site Characterization Plan ("ISCP") to IDEM setting forth in detail the actions Respondent shall take to complete and submit an Initial Site Characterization ("ISC") that meets the requirements of 329 IAC 9-5-5.1. The ISCP shall be subject to review, modification and approval by IDEM. The ISCP must be approved by IDEM prior to implementation. In the event IDEM determines

that the ISCP submitted by Respondent is deficient or otherwise unacceptable, Respondent shall revise and resubmit the ISCP to IDEM in accordance with IDEM's notice. Upon notification of deficiencies in the ISCP, Respondent shall have fifteen (15) days to revise and resubmit an ISCP to IDEM which addresses the deficiencies. After three (3) submissions of the ISCP by Respondent, IDEM may modify and approve any such ISCP and Respondent must implement the ISCP as modified by IDEM. The approved ISCP shall be incorporated into this Order and shall be deemed an enforceable part thereof.

- c. Within thirty (30) days of IDEM ISCP approval, Respondent shall implement the approved ISCP in accordance with the schedule contained therein and submit the results of the ISC to IDEM. Respondent shall submit and implement additional ISC plans at IDEM's request if IDEM determines that further site investigation is needed to adequately delineate the extent of contamination.
- d. Respondent shall, within sixty (60) days of receiving written notice from IDEM, submit a Further Site Investigation Plan ("FSIP") to IDEM setting forth in detail the actions Respondent shall take to complete and submit a Further Site Investigation ("FSI") that meets the requirements of 329 IAC 9-5-6. The FSIP shall be subject to review, modification and approval by IDEM. The FSIP must be approved by IDEM prior to implementation. In the event IDEM determines that the FSIP submitted by Respondent is deficient or otherwise unacceptable, Respondent shall revise and resubmit the FSIP to IDEM in accordance with IDEM's notice. Upon notification of deficiencies in the FSIP, Respondent shall have fifteen (15) days to revise and resubmit a FSIP to IDEM which addresses the deficiencies. After three (3) submissions of the FSIP by Respondent, IDEM may modify and approve any such FSIP and Respondent must implement the FSIP as modified by IDEM. The approved FSIP shall be incorporated into this Order and shall be deemed an enforceable part thereof.
- e. Upon IDEM approval of the FSIP, Respondent shall implement the approved FSIP in accordance with the schedule contained therein and submit the results of the FSI to IDEM. Respondent shall submit and implement additional FSI plans at IDEM's request if IDEM determines that further site investigation is needed to adequately delineate the extent of contamination.
- f. Respondent shall, within sixty (60) days of receiving written notice from IDEM, submit a Corrective Action Plan ("CAP") as described in 329 IAC 9-5-7. Respondent shall utilize IDEM's UST Branch Guidance Manual October 1994 update to develop the CAP. The CAP shall be subject to review, modification and approval by IDEM. In the event IDEM determines that the CAP submitted by Respondent is deficient or otherwise unacceptable, Respondent shall revise and resubmit the CAP to IDEM in accordance with IDEM's notice. Upon notification of deficiencies in the CAP, Respondent shall have fifteen (15) days to revise and resubmit a CAP to IDEM which addresses the deficiencies. After three (3) submissions of the CAP by Respondent, IDEM may modify and approve any such CAP and Respondent must implement the

CAP as modified by IDEM. The approved CAP shall be incorporated into this Order and shall be deemed an enforceable part thereof.

- g. Upon IDEM approval of the CAP, Respondent shall implement the approved CAP in accordance with the schedule contained therein.
- h. Respondent shall apply for and obtain all necessary permits pertaining to testing and remediation on-site and off-site prior to any remediation activities being performed.
- i. Respondent shall permit an agent of IDEM to view and inspect the activities performed pursuant to the approved FSIP and/or CAP. In order to facilitate such an inspection, Respondent shall notify IDEM's Leaking Underground Storage Tank Section at least seven (7) days prior to any scheduled activities.
- j. All submittals required by this Order, unless notified otherwise in writing, shall be made in accordance with the directions contained by the Notice and Order of the Commissioner of the Indiana Department of Environmental Management.

FINAL ORDER

For all of the foregoing reasons, **IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that the Respondent, Baker Oil Company, d/b/a Johnny Hall-Mar, Inc., for a gas station at 303 East Main Street, Paoli, Orange County, Indiana, violated 329 IAC 9-2-1(1)(B), 329 IAC 9-3-1(b)(12), 329 IAC 9-3-1(b)(2), 329 IAC 9-3.1-4(b)(7), 329 IAC 9-4-3(2), 329 IAC 9-5-5.1(a), 329 IAC 9-7-4(4) and 329 IAC 9-7-5(2). Respondent, Baker Oil Company, d/b/a Johnny Hall-Mar, Inc., is subject to civil penalties of Eighty Thousand Dollars (\$80,000) for violating Indiana's environmental management laws. Except for the amount of civil penalty, the Indiana Department of Environmental Management's September 10, 2009 Commissioner's Order is **AFFIRMED, subject to the following Order:**

- a. Respondent shall permanently close the UST system as follows:
 - 1. close the UST systems within sixty (60) days in accordance with the requirements of 329 IAC 9-6-1 through 329 IAC 9-6-4, including the applicable requirements for corrective action under 329 IAC 9-5-1 through 9-5-8; and
 - 2. Submit a UST Closure Report in accordance with 329 IAC 9-6-2.5 within thirty (30) days of closing the UST system;
- b. Within sixty (60) days, Respondent shall comply with 329 IAC 9-5-5.1. Specifically, Respondent shall submit an Initial Site Characterization Plan ("ISCP") to IDEM setting forth in detail the actions Respondent shall take to complete and submit an Initial Site Characterization ("ISC") that meets the requirements of 329 IAC 9-5-5.1. The ISCP shall be subject to review, modification and approval by IDEM. The ISCP must be approved by IDEM prior to implementation. In the event IDEM determines that the ISCP submitted by Respondent is deficient or otherwise unacceptable, Respondent shall revise and resubmit the ISCP to IDEM in accordance with IDEM's notice. Upon notification of

deficiencies in the ISCP, Respondent shall have fifteen (15) days to revise and resubmit an ISCP to IDEM which addresses the deficiencies. After three (3) submissions of the ISCP by Respondent, IDEM may modify and approve any such ISCP and Respondent must implement the ISCP as modified by IDEM. The approved ISCP shall be incorporated into this Order and shall be deemed an enforceable part thereof.

- c. Within thirty (30) days of IDEM ISCP approval, Respondent shall implement the approved ISCP in accordance with the schedule contained therein and submit the results of the ISC to IDEM. Respondent shall submit and implement additional ISC plans at IDEM's request if IDEM determines that further site investigation is needed to adequately delineate the extent of contamination.
- d. Respondent shall, within sixty (60) days of receiving written notice from IDEM, submit a Further Site Investigation Plan ("FSIP") to IDEM setting forth in detail the actions Respondent shall take to complete and submit a Further Site Investigation ("FSI") that meets the requirements of 329 IAC 9-5-6. The FSIP shall be subject to review, modification and approval by IDEM. The FSIP must be approved by IDEM prior to implementation. In the event IDEM determines that the FSIP submitted by Respondent is deficient or otherwise unacceptable, Respondent shall revise and resubmit the FSIP to IDEM in accordance with IDEM's notice. Upon notification of deficiencies in the FSIP, Respondent shall have fifteen (15) days to revise and resubmit a FSIP to IDEM which addresses the deficiencies. After three (3) submissions of the FSIP by Respondent, IDEM may modify and approve any such FSIP and Respondent must implement the FSIP as modified by IDEM. The approved FSIP shall be incorporated into this Order and shall be deemed an enforceable part thereof.
- e. Upon IDEM approval of the FSIP, Respondent shall implement the approved FSIP in accordance with the schedule contained therein and submit the results of the FSI to IDEM. Respondent shall submit and implement additional FSI plans at IDEM's request if IDEM determines that further site investigation is needed to adequately delineate the extent of contamination.
- f. Respondent shall, within sixty (60) days of receiving written notice from IDEM, submit a Corrective Action Plan ("CAP") as described in 329 IAC 9-5-7. Respondent shall utilize IDEM's UST Branch Guidance Manual October 1994 update to develop the CAP. The CAP shall be subject to review, modification and approval by IDEM. In the event IDEM determines that the CAP submitted by Respondent is deficient or otherwise unacceptable, Respondent shall revise and resubmit the CAP to IDEM in accordance with IDEM's notice. Upon notification of deficiencies in the CAP, Respondent shall have fifteen (15) days to revise and resubmit a CAP to IDEM which addresses the deficiencies. After three (3) submissions of the CAP by Respondent, IDEM may modify and approve any such CAP and Respondent must implement the CAP as modified by IDEM. The approved CAP shall be incorporated into this Order and shall be deemed an enforceable part thereof.

- g. Upon IDEM approval of the CAP, Respondent shall implement the approved CAP in accordance with the schedule contained therein.
- h. Respondent shall apply for and obtain all necessary permits pertaining to testing and remediation on-site and off-site prior to any remediation activities being performed.
- i. Respondent shall permit an agent of IDEM to view and inspect the activities performed pursuant to the approved FSIP and/or CAP. In order to facilitate such an inspection, Respondent shall notify IDEM's Leaking Underground Storage Tank Section at least seven (7) days prior to any scheduled activities.
- j. All submittals required by this Order, unless notified otherwise in writing, shall be made in accordance with the directions contained by the Notice and Order of the Commissioner of the Indiana Department of Environmental Management.

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 in Indianapolis, Indiana this 26th day of August, 2011.

Hon. Mary L. Davidsen
Chief Environmental Law Judge