

Commissioner, Indiana Department of Environmental Management,
Case No. 2002-11819-W,

v.

Tanner's Creek Properties, LLC,
Lawrenceburg, Dearborn County, Indiana
2011 OEA 122, (05-W-E-3558)

OFFICIAL SHORT CITATION NAME: When referring to 2011 OEA 122 cite this case as
Tanner's Creek Properties, LLC, 2011 OEA 122.

TOPICS:

erosion control	days of noncompliance
fill material	base civil penalty
Engagement Agreement	aggravating factors
Notice of Intent	mitigating factors
five acres	Notice of Violation (NOV)
Rule 5	Civil Penalty Policy, Doc. 99-0002-NPD
site inspection	National Pollution Discharge Elimination
off-site sedimentation	System (NPDES)
Agreed Order	Notice and Order of the Commissioner (CO)
Requests for Admission	Ind. Trial Rule Procedure 36
Notice of Bankruptcy	327 IAC 15-5
Pro se litigants	327 IAC 15-5-7
moderate extent of deviation	I.C. § 13-30-2-1(1)
moderate potential for harm	I.C. § 13-18-4-5

PRESIDING JUDGE:

Mary L. Davidsen

PARTY REPRESENTATIVES:

IDEM: April D. Lashbrook, Esq.
Respondent: Mark E. Shere, Esq.

ORDER ISSUED:

August 26, 2011

INDEX CATEGORY:

Water

FURTHER CASE ACTIVITY:

[none]

Commissioner, Indiana Department of Environmental Management,
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v.

Tanner's Creek Properties, LLC,
Lawrenceburg, Dearborn County, Indiana
2011 OEA 122, (05-W-E-3558)

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

IN THE MATTER OF:)

)
)
COMMISSIONER, INDIANA DEPARTMENT)
OF ENVIRONMENTAL MANAGEMENT,)
Case No. 2002-11819-W,)
Complainant,)

v.)

CAUSE NO. 05-W-E-3558

)
)
TANNER'S CREEK PROPERTIES, LLC,)
Lawrenceburg, Dearborn County, Indiana,)
Respondent)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

This matter is before the Office of Environmental Adjudication ("OEA" or "Court") on the Final Hearing held on October 8, 2009. At issue at Final Hearing was the amount of civil penalty which should be imposed on Tanner's Creek Properties, LLC ("Tanner's Creek") liability for the environmental law violations concerning erosion control, as found in the Court's May 9, 2009 Order on Summary Judgment, which is incorporated into this Final Order by reference. The Chief Environmental Law Judge ("ELJ") having considered the petitions, 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 Order:

FINDINGS OF FACT

1. As the Court's May 9, 2009 Order on Summary Judgment, held in enumerated Findings of Fact 1 through portions of 11, Tanner's Creek Properties LLC ("Tanner's Creek"), initiated development of a commercial and multi-family residential Site located on the north and south sides of U.S. 50, approximately 1 mile west of the State Highway 48 intersection, in Lawrenceburg, Dearborn County, Indiana (the "Site"). In 1998, Tanner's Creek began a project, in conjunction with LMS Contracting, Inc. ("LMS"), to remove fill material for construction of a building pad for a proposed power plant at the Site. *Tanner's Creek Response to IDEM's Motion for Summary Judgment Exs. 1, 4.* ("Tanner's Creek Response"). The first page of an Excavation Agreement between Tanner's Creek and LMS provides:

Owner and Contractor agree as follows:

**Commissioner, Indiana Department of Environmental Management,
Case No. 2002-11819-W,**

v.

**Tanner's Creek Properties, LLC,
Lawrenceburg, Dearborn County, Indiana
2011 OEA 122, (05-W-E-3558)**

1. Engagement Owner (Tanner's Creek) hereby allows Contractor (LMS) to remove fill from Owner's property for the purpose of performing (sic) the work for the scope of the Project. Contractor is an independent contractor and not an employee of the Owner. Contractor further agrees to hold harmless and defend the Owner in any dispute arising from injury, safety violations, civil criminal charges or other claims or liability in connection with the work involved in this Contract. **Contractor is responsible for all costs associated with the removal of the fill as directed by Owner, including but not limited to clearing, erosion control, permits, surveying, blasting, bonding, insurance etc./**Owner will provide engineering to determine areas from which fill will be taken.

Tanner's Creek Response Ex. 8 (only first page provided).

2. Tanner's Creek did not have a general National Pollution Discharge Elimination System ("NPDES") permit prior to initiating land disturbing activities at the Site.
3. On November 11, 1998, Tanner's Creek submitted a Notice of Intent for the Site (NOI) to disturb five (5) or more acres of land on November 11, 1998. IDEM approved Tanner's Creek's NOI on December 14, 1998. *IDEM's Motion, Ex. A; Tanner's Creek Response Ex, p. 4.*
4. Site inspections were conducted by Mark Goldsmith, Indiana Department of Natural Resources ("DNR"), Division of Soil Conservation Stormwater Specialist. In summary judgment briefing, Respondent Tanner's Creek asserted that Mr. Goldsmith's written reports contradicted his spoken statements made to Tanner's Creek representatives. Mr. Goldsmith's December 16, 1998 report noted his observations that land-disturbing activities had been initiated at the Site. *IDEM Motion Ex. E, On-Site Evaluation for Erosion and Sediment Control ("OEESC") inspection report of December 16, 1998; IDEM Motion, Ex. F, Aff. of Randy Braun.* Mr. Goldsmith reported that earthwork in process exposed large areas of soil on both the north and south sides of U.S. 50. *Id.* Mr. Goldsmith's written report stated a marginal rating for site erosion control and sediment trap efforts which might comply with Rule 5, such as silt fences, diversion berms, and rock dams. *Id.* Mr. Goldsmith provided Tanner's Creek until January 1, 1999 to comply with a list of modifications required for Rule 5 compliance, including repairs to the silt fence, installation of additional rock dams, and increasing the height of the diversion berm. *Id.*
5. From March 1, 2001 through August 8, 2002, Mr. Goldsmith performed five routine and/or follow-up Site inspections. *IDEM's Motion, Ex. G, OEESC inspection reports of March 1, 2001, April 16, 2001, February 7, 2002, March 14, 2002, and August 8, 2002; IDEM Motion, Ex. F.* Multiple elements of the site erosion and sediment control mechanisms were rated primarily as either marginal or unsatisfactory in each of the OEESC report during Mr. Goldsmith's Site inspection reports. *IDEM's Motion, Ex. G.* All eight (8) of the OEESC

**Commissioner, Indiana Department of Environmental Management,
Case No. 2002-11819-W,**

v.

**Tanner's Creek Properties, LLC,
Lawrenceburg, Dearborn County, Indiana
2011 OEA 122, (05-W-E-3558)**

reports compiled by Mr. Goldsmith during this period indicated that the Site conditions presented a high potential for off-site sedimentation. *Id.* The August 8, 2002 OEESC report provided:

Significant runoff and erosion problems persist at the site. Substantial runoff controls will need to be designed and implemented to handle the excessive runoff from the current state of the development. It is not acceptable to leave the site in this poor condition.

Id. at p. 14. Mr. Goldsmith reported further that the case would be turned over to IDEM for formal enforcement action, due to the "continued non-compliance and general lack of effort" of Tanner's Creek, *Id.*

6. IDEM issued a Notice of Violation and Proposed Agreed Order to Tanner's Creek ("NOV") on March 7, 2003, citing violations of Rule 5. *IDEM Motion, Ex. H, NOV.* The NOV stated that Tanner's Creek did not comply with 327 IAC 15-5-7(b) and (c) because it failed to minimize runoff and sedimentation leaving the Site and because it failed to implement and maintain sediment and erosion control measures at the Site. *Id.* at p. 2. The NOV provided further that Tanner's Creek did not adequately protect disturbed areas of earth, implement appropriate perimeter sediment control measures, stabilize or protect conveyance channels, properly install or maintain erosion and sediment control measures, protect storm drain inlets, or keep roadways clear of accumulated or tracked soil. *Id.*
7. After referral to IDEM, Mr. Goldsmith performed a March 13, 2003 Site inspection. *IDEM Motion, Ex. I, March 19, 2003 OEESC inspection report.* Mr. Goldsmith's report stated that he observed sediment laden runoff from the Site running uncontrolled over the U.S. 50 road bank, causing excessive erosion. *Id.* Additional runoff was observed entering the storm sewer inlets and being discharged into the stream east of the Site. *Id.* The report also included four (4) photographs documenting the violations. *Id.* at pp. 3-4. In his report, Mr. Goldsmith designated the Site as unsatisfactory in all eight (8) applicable standards for erosion and sediment control. *Id.* at p. 1.
8. After IDEM issued the NOV and an Agreed Order for Tanner's Creek's consideration, the parties' attempted but did not succeed at negotiating mutually acceptable terms for the Agreed Order. On June 1, 2005, IDEM's Commissioner issued a Notice and Order ("Commissioner's Order") pursuant to I.C. § 13-30-3-4. *IDEM Motion, Ex. J, Commissioner's Order.*
9. The Commissioner's Order required Tanner's Creek to cease and desist any further land-disturbing activities until it submitted the documents and plans required by Rule 5. *Id.* at p. 3. The Order also required Tanner's Creek to implement erosion control and sedimentation prevention measures, submit a new Notice of Intent to IDEM within 30 days, and inspect the site weekly and after measurable storm events to ensure that the erosion control measures

**Commissioner, Indiana Department of Environmental Management,
Case No. 2002-11819-W,**

v.

**Tanner's Creek Properties, LLC,
Lawrenceburg, Dearborn County, Indiana
2011 OEA 122, (05-W-E-3558)**

were working properly. *Id at p. 4.* The Commissioner's Order required Tanner's Creek to pay civil penalties of \$35,000 for the violations. *Id. at p. 6.* Tanner's Creek, through counsel, timely filed a Petition for Administrative Review ("Petition") of the Commissioner's Order on June 17, 2005. *IDEM Motion, Ex. K, Petition.*

10. As part of the litigation of this cause, IDEM filed the Commissioner's First Set of Discovery Requests, including Requests for Admission on January 10, 2006 ("Discovery Requests"). *IDEM MSJ Ex. B.* Request for Admission 11 stated, "The civil penalty contained in the Notice and Order of the Commissioner in this case is not arbitrary and capricious." *IDEM Motion, Ex. B, p. 5.* IDEM's March 1, 2006 Notice to the Court Concerning Discovery noted that Respondent Tanner's Creek had not responded to IDEM's January 10, 2006 Discovery Requests, that the Court had not issued discovery response deadlines, therefore the Requests for Admission were deemed admitted per Ind. Tr. R. 36. *IDEM Motion, Ex. C.* In its August 30, 2007 Status Report, Tanner's Creek states that outstanding discovery issues "can be resolved cooperatively and information exchanged over a sixty day period, assuming the discovery remains relevant following the Superior Court's decision" concerning a statutes of limitation issue raised in another IDEM enforcement case. *IDEM Motion, Ex. D.* Tanner's Creek did not respond to IDEM's discovery requests.
11. Respondent Tanner's Creek's Motion for Summary Judgment was filed on March 30, 2008; Complainant IDEM's Motion for Summary Judgment was filed on July 27, 2008. The Court held in IDEM's favor in its May 29, 2009 Non-Final Order, stated above. At the October 8, 2009 Final Hearing, the parties presented testimony.
12. At Final Hearing, the parties supplemented their evidence presented on summary judgment with witness testimony and exhibits. After the final hearing setting the parties submitted briefs and Proposed Findings of Fact, Conclusions of Law and Order in support of their positions.

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.

**Commissioner, Indiana Department of Environmental Management,
Case No. 2002-11819-W,**

v.

**Tanner's Creek Properties, LLC,
Lawrenceburg, Dearborn County, Indiana
2011 OEA 122, (05-W-E-3558)**

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. *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.
5. Tanner's Creek's June 17, 2005 Petition for Review objecting to IDEM's June 1, 2005 Commissioner's Order was filed in a timely manner. After prior litigation and decision by this Court of the applicable limitation of action and other procedural matters in this cause (incorporated in full herein by reference), and an earlier decision dated May 29, 2009, on IDEM's Motion for Summary Judgment, the remaining the issues for consideration concern the appropriate amount of civil penalty to be assessed.
6. Indiana Rule of Trial Procedure 36 deals with Requests for Admissions. A request for admission is deemed admitted if not answered within thirty (30) days under Trial Rule 36(A), which states: "The matter is admitted unless, within a period designated in the request, not less than thirty [30] days after service thereof or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney."

**Commissioner, Indiana Department of Environmental Management,
Case No. 2002-11819-W,**

v.

**Tanner's Creek Properties, LLC,
Lawrenceburg, Dearborn County, Indiana
2011 OEA 122, (05-W-E-3558)**

7. Indiana Rule of Trial Procedure 36(B) states: "Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission."
8. Tanner's Creek did not respond to IDEM's January 10, 2006 Requests for Admission in such a way, so that the Court is required to deem the requests for admissions admitted in accordance with Indiana Trial Rule 36.
9. 327 IAC 15-5 is frequently referred to as "Rule 5", and regulates specified land disturbing activities. 327 IAC 15-5-7 requires several erosion control measures to be met on all sites during the period when land-disturbing activities occur. The requirements include: detaining sediment-laden water from reaching streams, keeping sediment off roadways, protecting storm drains from sedimentation, protecting existing storm water drainage channels from the land-disturbing activities, and controlling soil run-off through appropriate erosion control measures. 327 IAC 15-5-7(b).
10. This Court, in its May 29, 2009 Order, determined that Tanner's Creek violated 327 IAC 15-5-7 as a matter of law. This Court further found that Tanner's Creek violated I.C. § 13-30-2-1(1) and I.C. § 13-18-4-5.
11. The May 29, 2009 Order established that, as a matter of law, Tanner's Creek is subject to civil penalties for violating Indiana's environmental management laws and water pollution control laws. "Any person who violates any provision of environmental management laws [or] water pollution control laws... is liable for a civil penalty not to exceed twenty-five thousand dollars (\$25,000) per day of any violation." I.C. § 13-30-4-1. Tanner's Creek violated Indiana environmental management laws and water pollution control laws. Consequently, Tanner's Creek is subject to civil penalties for these violations.
12. The Commissioner's Order was issued to Tanner's Creek for its failure to implement erosion control measures. To calculate the amount of civil penalty, IDEM used its Civil Penalty Policy Non-Rule Policy Document when calculating the penalty of \$35,000 described in the Commissioner's Order. *IDEM Motion for Summary Judgment, Ex. J, p. 6.*

**Commissioner, Indiana Department of Environmental Management,
Case No. 2002-11819-W,**

v.

**Tanner's Creek Properties, LLC,
Lawrenceburg, Dearborn County, Indiana
2011 OEA 122, (05-W-E-3558)**

13. At hearing, IDEM representative Edward Judson testified regarding the civil penalty policy, civil penalty worksheet, and the decisions IDEM made when calculating the penalty, as he determined from reviewing the case file in the matter.¹ Mr. Judson further testified as to the factors IDEM typically uses to calculate a civil penalty in Rule 5 cases. Mr. Judson testified that the violations described above were merged into a single penalty calculation in this matter. IDEM often merges violations when two separate violations occur and the violations are part of the same overall rule, here 327 IAC 15-5-7.
14. Mr. Judson testified that a “moderate” potential for harm was chosen because this was a very hilly site, multiple inspection reports showed that there were no or minimal efforts toward sediment control, and sediment traveled uncontrolled over the road bank. Complainant’s witness, Tanner’s Creeks Craig Hilsinger testified that he had worked in site development in multiple states for numerous years, but had not heard of Rule 5, or of many of the requirements described under Rule 5 at final hearing. Mr. Hilsinger further stated that the Rule 5 requirements described in IDEM’s evidence was not a correct statement of requirements present in other states. As for the Tanner’s Creek Site, Mr. Hilsinger testified that sediment controls had been installed by 2003. However, this fact does not mitigate the potential for harm that occurred from the violations of the rule in 2000, 2001, and 2002, as documented in several inspections.
15. Mr. Judson testified that IDEM chose a moderate deviation from the rule because the inspection reports showed that sediment flowed into waters of the state. During the 2000-2002 time period, Tanners Creek did make some, albeit inadequate, efforts to comply with the rule. For these reasons, substantial evidence exists to show that a moderate deviation from the rule is appropriate.
16. Mr. Judson testified that choosing the middle of the cell for a moderate/ moderate violation is IDEM’s practice when there are no aggravating or mitigating factors indicating a different choice should be made. The middle of the matrix penalty of \$8,750 for a violation assigned a moderate potential from harm and moderate deviation from the rule is appropriate, as there was no evidence presented of mitigating or aggravating factors.
17. Mr. Judson testified to a number of reductions that were built in to IDEM’s calculation of a total civil penalty. These reductions included merging the violations, including 6 inspections instead of 7 in the penalty calculation, and reducing the 6 inspections to 4 violation days. There is substantial evidence to support a total penalty of \$35,000, given a matrix penalty of \$8,750 multiplied by 4 violation days. Therefore, IDEM assessed Tanner’s Creek a civil penalty of \$35,000.

¹ Mr. Judson was not the assigned case manager when the penalty was calculated, but testified from his knowledge of the case file and knowledge of how IDEM typically calculates civil penalties in Rule 5 cases.

**Commissioner, Indiana Department of Environmental Management,
Case No. 2002-11819-W,**

v.

**Tanner's Creek Properties, LLC,
Lawrenceburg, Dearborn County, Indiana
2011 OEA 122, (05-W-E-3558)**

18. I.C. § 13-30-4-1 authorizes the IDEM to assess a penalty of \$25,000 per day per violation. The IDEM used the Civil Penalty Policy² to determine the appropriate penalty in this matter. IDEM's determination that the applicable civil penalty complies with I.C. § 13-30-4-1. However, this matter is to be determined *de novo* by the Court. The Court's duty to perform *de novo* review is not abrogated by Tanner's Creek's Request for Admission that it IDEM's civil penalty calculation was not arbitrary and capricious, as that is not the applicable standard for this Court to apply in conducting a *de novo* review.
19. 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 non-compliance." The base civil penalty is calculated taking into account two factors: (1) the potential for harm and (2) the extent of deviation.
20. 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 non-compliance 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.
21. The policy further states that the extent of deviation relates to the degree to which the requirement is violated. A moderate extent of deviation is defined as "The violator significantly deviates from the requirements of the regulation, permit, or statute or only some of the requirements are implemented".
22. 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,

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

**Commissioner, Indiana Department of Environmental Management,
Case No. 2002-11819-W,**

v.

**Tanner's Creek Properties, LLC,
Lawrenceburg, Dearborn County, Indiana
2011 OEA 122, (05-W-E-3558)**

the Court selected minor potential for harm and a minor deviation, with the lowest point in the matrix applied.

23. In this case, the Court's analysis of the potential for harm and of the extent of deviation, and the number of violation "days" is in full agreement with IDEM's analysis, that the violations may be merged into one violation, that the potential for harm for the violations was moderate and that the extent of deviation was also moderate, and that 4 violation "days" should be assessed. The Civil Penalty Policy sets the range for a violation of moderate potential for harm and moderate extent of deviation at \$7,500 to \$10,000.
24. The aggravating factors in this instance are that the IDEM has been working with the Respondent for several years to bring the Site into compliance. To a certain extent, this has been successful as shown by the numerous portions of the Site which were still eroding after compliance was attempted, or not maintained. However, Site erosion did obstruct U.S. 50. The Site's hilly topography makes it difficult to stabilize. While Tanner's Creek testified that the site is in compliance, substantial evidence presented by witnesses for IDEM and concurred with by Tanner's Creek's witness that erosion control was not always in compliance with the regulations.
25. Both parties presented substantial evidence that Tanner's Creek had attempted cooperation at times. Otherwise, there are no mitigating factors.
26. The ELJ concludes that the potential for harm is moderate because of the length of time that the Respondent has been out of compliance. Further, the extent of deviation is moderate because the Respondent made attempts to comply with the regulations.
27. The (lack of) aggravating and mitigating factors, and a review of all of the factors relevant to calculation of Civil Penalty in this cause, support selecting a penalty from the lowest point of the penalty range (\$7,500).
28. The IDEM presented substantial evidence of 1, for 4 days. Therefore, the appropriate penalty is \$30,000 ($\$7,500 \times 1 \text{ violation} \times 4 \text{ days} = \$30,000$).
29. Based on the parties' testimony about site conditions and property ownership, the Site requires no further corrective action.

FINAL ORDER

**Commissioner, Indiana Department of Environmental Management,
Case No. 2002-11819-W,**

v.

**Tanner's Creek Properties, LLC,
Lawrenceburg, Dearborn County, Indiana
2011 OEA 122, (05-W-E-3558)**

For all of the foregoing reasons, **IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that: the Respondent, Tanner's Creek, LLC, violated I.C. § 13-30-2-1(1), I.C. § 13-18-4-5, and 327 IAC 15-5-7. Respondent, Tanner's Creek, LLC is subject to civil penalties of Thirty Thousand Dollars (\$30,000) for violating Indiana's water pollution control laws. The Indiana Department of Environmental Management's June 1, 2005 Commissioner's Order is **AFFIRMED**.

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 Non-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 Non-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