

Commissioner, Indiana Department of Environmental Management,
IDEM Cause No. SW-236,

v.

Lloyd Stidham,
Washington, Daviess County, Indiana
2012 OEA 30, (05-S-E-3616)

OFFICIAL SHORT CITATION NAME: When referring to 2012 OEA 30 cite this case as
Lloyd Stidham, 2012 OEA 30.

TOPICS:

solid waste management
auto salvage yard
purchasers
lessees
waste tires
construction waste
waste from autos
open dump
inspection
Open Dump Inspection Report
hearsay
Notice of Violation (NOV)
Agreed Order (AO)
Commissioner's Order (CO)
noncompliance
personal hardship

business hardship
Requests for Admission
Admissions deemed admitted
Civil penalty
Summary Judgment
Affidavit
I.C. § 4-21.5-3-26(a)
I.C. § 13-11-2-146, -147
I.C. § 13-30-2-1 (3) (4), (5)
I.C. § 13-7-4-1 (3), (4)
329 IAC 10-4-2, -3
329 IAC 2-4-2, -3
Tr. R. 36
IDEM Civil Penalty Policy
ID No. Enforcement 99-0002-NPD

PRESIDING JUDGE:

Mary L. Davidsen

PARTY REPRESENTATIVES:

IDEM: Timothy J. Junk, Esq.
Respondent: Ralph E. Randall, Esq.

ORDER ISSUED:

June 25, 2012

INDEX CATEGORY:

Land

FURTHER CASE ACTIVITY:

[none]

STATE OF INDIANA)
)

BEFORE THE INDIANA OFFICE
OF ENVIRONMENTAL ADJUDICATION

**Commissioner, Indiana Department of Environmental Management,
IDEM Cause No. SW-236,**

v.

**Lloyd Stidham,
Washington, Daviess County, Indiana
2012 OEA 30, (05-S-E-3616)**

COUNTY OF MARION)

IN THE MATTER OF:)

COMMISSIONER, INDIANA DEPARTMENT)

OF ENVIRONMENTAL MANAGEMENT)

IDEM CAUSE NO. SW-236,)

Complainant)

v.)

CAUSE NO. 05-S-E-3616

LLOYD STIDHAM,)

Washington, Daviess 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 a March 28, 2008 Final Hearing, as to whether Respondent Lloyd Stidham violated Indiana environmental laws and whether civil penalties should be imposed for solid waste management practices at property located at the junction of State Road 56 and State Road 3, Blocher, Scott County, Indiana. The Court’s August 3, 2007 Findings of Fact, Conclusions of Law and Order (incorporated into this Final Order by reference) denied summary judgment as precluded by genuine issues of material fact as to whether Respondent Stidham owned and operated the Site in 1993 when violations occurred, when the violations occurred (in 1993 or in 2004/2005), and as to the exact amount of civil penalty to be imposed.

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 Final Order:

FINDINGS OF FACT

1. This case concerns property at the junction of State Roads 56 and 3, Blocher, Scott County, Indiana (“Site”). Respondent Lloyd Stidham (“Stidham” or “Respondent”) has had renters and a failed contract sale of the Site since he acquired it in 1984, but has not conveyed the Site. When Mr. Stidham acquired the Site in 1984, there were two buildings on the Site which housed discontinued businesses of a truck stop and hotel. Respondent Stidham testified that prospective purchasers Raymond and Sylvia Goins intended to purchase the Site

for \$250,000 once the Site zoning changes, but had not acquired title to the property. By

**Commissioner, Indiana Department of Environmental Management,
IDEM Cause No. SW-236,**

v.

**Lloyd Stidham,
Washington, Daviess County, Indiana
2012 OEA 30, (05-S-E-3616)**

substantial evidence, Mr. Stidham has owned the Site property since 1984.

2. Mr. Stidham testified that the Site has been used continuously by tenants and prospective contract purchasers as an auto salvage yard during his ownership. Some of the prospective purchasers or lessees failed to fulfill their promises to Mr. Stidham to clean up the Site. Substantial evidence presented in this case showed that as of the March 28, 2008 Final Hearing setting, waste tires, construction waste, and waste from autos and other sources was stored on the Site, but that the Site was not an auto salvage business during Mr. Stidham's ownership. A portion of the Site burned in October 2007.
3. Conditions at the Site, as documented by IDEM's solid waste inspectors, presented substantial evidence of the Site's use and types of waste stored on the Site. Starting on May 7, 1993, and through the time of final hearing, IDEM Solid Waste Inspector Richard Schroeder investigated the Site, and wrote 12 Site inspection reports.
4. Inspector Schroeder has served as an IDEM Solid Waste Inspector since 1984. As part of his job duties, Inspector Schroeder is required to inspect open dumps, and landfills, waste tire facilities, and other solid waste facilities. As of the March 24, 2008 Final Hearing, Inspector Schroeder inspected approximately 200 open dumps per year. Approximately 90 percent of Inspector Schroeder's investigations resolve in the responsible party remedying the allegations of open dumping without the need for further enforcement action by IDEM. Inspector Schroeder stated that his then-current rate of pay was \$20 per hour.
5. Inspector Schroeder's inspections of this Site were typical to his usual site inspections, lasting between 45 minutes and 3 hours. Usually before leaving the Site (to record observed conditions accurately), Inspector Schroeder wrote each "Open Dump Inspection Report." Inspector Schroeder occasionally observed the Site on other occasions while driving by. The following waste was present on the Site:
 - a. May 7, 1993: vehicle frames, automobile parts, tires, domestic garbage, roofing materials, 3 bus frames. *Ex. 1, photograph 1.*
 - b. July 1, 1993: auto parts, tires, lumber. *Ex. 1, photograph 6; see Ex. 6., July 21, 1993 Inspection Report.*
 - c. November 8, 1993: Car metal, tires, wire, cable, bus frames, furniture, roofing, assorted metal, car gas tanks, lumber, and plastics. *Ex. 1, photograph 7; see Ex. 7., November 8, 1993 Inspection Report.*
 - d. August 18, 1994: same as prior inspections, no significant reductions in type and volume of waste. *Ex. 1, photograph 8; E; see Ex. 8, August 18, 1994 Inspection Report.*
 - e. July 7, 2004: piles of waste tires, soil contaminated with auto fluids. *Ex. 1, photograph 9; see Ex. 9, July 7, 2004 Inspection Report.*
 - f. July 26, 2004: approximately 1,100 tires in piles. *Ex., 1, photograph 10; see Ex.*

**Commissioner, Indiana Department of Environmental Management,
IDEM Cause No. SW-236,**

v.

**Lloyd Stidham,
Washington, Daviess County, Indiana
2012 OEA 30, (05-S-E-3616)**

10, July 26, 2004 Inspection Report.

- g. September 2, 2004: Contaminated soil, waste tires, furniture, garbage. *Ex., 1, photograph 11; see Ex. 11, September 2, 2004 Inspection Report.*
 - h. April 11, 2005: Assorted items of solid waste, thousands of tires, roofing materials, metal, garbage, plastic buckets, furniture. *Ex.1, photograph 12; see Ex. 12, April 11, 2005 Inspection Report with May 9, 2005 IDEM Violation Letter received by Stidham May 4, 2005.*
 - i. June 25, 2005: no change; miscellaneous solid waste items. *Ex. 1, photograph 13; see Ex. 13, June 22, 2005 Inspection Report.*
 - j. October 26, 2007: burned waste in spaces previously occupied by mobile homes, clothing, furniture, bedding, piles of miscellaneous solid waste items. *Ex. 1, photograph 14; see Ex. 14, October 26, 2007 Inspection Report.*
 - k. November 29, 2007: piles of waste tires. *Ex. 1, photograph 15; see Ex. 15, November 29, 2007 Inspection Report.*
 - l. March 19, 2008: piles of miscellaneous solid waste items, over 600 tires in piles, solid waste. *Ex. 1, photograph 16; see Ex. 16, March 19, 2008 Inspection Report.*
6. 1997 site inspections (conducted by other IDEM site inspectors, Lori A. Colpaert and Tim Holtz, assigned due to caseload allocation changes) were documented in IDEM Exhibit 17. Neither inspector was available to testify at final hearing. Respondent Stidham properly objected to Exhibit 17 as hearsay evidence. Exhibit 17 was admitted into the record as admissible hearsay, per I.C. § 4-21.5-3-26(a). Hearsay testimony contained in Ex. 17 provides substantial evidence of the following waste present on the Site in 1997:
- a. September 22, 1997: burning observed; tires, assorted solid waste items, burned debris present.
 - b. October 2, 1997: burning waste, house trailers, wood, insulation, plastics, assorted solid waste items.
 - c. October 24, 1997: tires, assorted solid waste, burned waste, insulation.
 - d. October 31, 1997: no progress in site restoration; assorted solid waste and a 55 gallon barrel containing solvent or paint was present.
7. The solid waste present on the Site included little automotive scrap material in a form or stored so that it could be salvaged and sold. The Site was characterized by over a thousand waste tires, some vehicles and auto parts, and nonautomotive materials, such as mattresses, discarded building materials, roofing, lumber and insulation.

**Commissioner, Indiana Department of Environmental Management,
IDEM Cause No. SW-236,**

v.

**Lloyd Stidham,
Washington, Daviess County, Indiana
2012 OEA 30, (05-S-E-3616)**

8. By substantial evidence, IDEM provided written notice of the Site's noncompliance over a period of years, starting on June 1, 1993. *Ex. 2.* Stidham's July 8, 1993 response requested additional compliance time due to personal hardships. *Ex. 3.* On July 30, 1993, IDEM granted the requested compliance extensions, through October, 1993. *Ex. 4.* IDEM's December 8, 1993 notice warned that the lack of progress would lead to formal enforcement. *Ex. 5.* On May 14, 2005, Stidham received IDEM's May 9, 2005 Violation Letter. *Ex. 12.*
9. On July 22, 1994, IDEM issued Stidham a Notice of Violation ("NOV") per I.C. § 13-30-3-3; Stidham received the NOV via certified mail on August 15, 1994. At least two modified agreed orders were not successful in resolving this case. The NOV cited Stidham for violations of 329 IAC 10-4-2¹, 329 IAC 10-4-3, I.C. § 13-30-2-1(3), I.C. § 13-30-2-1(4), I.C. §13-30-2-1(5). , 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), and for violations of laws applicable to "open dumps", as defined in I.C. § 13-11-2-146 and -147.
10. The parties did not enter into an Agreed Order. On October 5, 2005, IDEM issued Stidham a Notice and Order of the Commissioner of the Department of Environmental Management ("Commissioner's Order" or "CO").² The CO required Stidham to comply with applicable Site regulations and to take appropriate compliance actions, such as ceasing and desisting violations, removing and disposing of all solid waste at a state approved solid waste management facility, using a registered waste tire transporter to transport the waste tires to a state approved waste tire processor or waste management facility, and providing proof of proper disposal. For conditions observed on the Site in 2004 on July 7, July 26, and September 20, and in 2005 on April 11 and June 22, the CO also imposed a Civil Penalty of Three Thousand Five Hundred Dollar (\$3,500), to be paid to IDEM within thirty (30) days.
11. This Cause is the subject of Respondent Stidham's timely October 24, 2005 Petition for Administrative Review of the October 5, 2005 Commissioner's Order. The matter proceeded to Final Hearing on March 24, 2008. Witnesses were sworn and evidence was presented. During the course of this proceeding, IDEM was represented by legal counsel Timothy J. Junk, Esq. Mr. Stidham's legal representation was provided by Ralph E. Randall, Esq.
12. The Court's August 3, 2007 Order found that the following acts were deemed admitted:
 - a. The Respondent is the owner of the Site.
 - b. The Respondent owned the Site at the time that the CO was issued.
 - c. The Respondent is the operator of the Site.

¹ These violations were codified in section 2 instead of section 10 at the time of inspections; e.g., 329 IAC 2-4-2 instead of 329 10-4-2).

² IDEM provided a complete copy to the Court on April 18, 2008, to supplement Stidham's partial submission, composed of odd-numbered pages.

**Commissioner, Indiana Department of Environmental Management,
IDEM Cause No. SW-236,**

v.

**Lloyd Stidham,
Washington, Daviess County, Indiana
2012 OEA 30, (05-S-E-3616)**

- d. The Respondent was the operator of the Site at the time that the CO was issued.
 - e. The Respondent received the CO or about October 11, 2005.
 - f. The Respondent caused or allowed the storage or disposal of solid waste, including tires, construction/demolition debris and household waste at the Site.
 - g. The Respondent is subject to Title 329 of the Indiana Administrative Code and Title 329 is applicable to the facts of this matter.
 - h. The Respondent is subject to Title 13 of the Indiana Code and Title 13 is applicable to the facts of this matter.
 - i. The Respondent is subject to I.C. § 13-30-2-1(3) (codified as I.C. § 13-7-4-1(3) at the time of the inspections) and I.C. § 13-30-2-1(3) is applicable to the facts of this matter.
 - j. The Respondent is subject to I.C. § 13-30-2-1(4) (codified as I.C. § 13-7-4-1(3) at the time of the inspections) and I.C. § 13-30-2-1(4) is applicable to the facts of this matter.
 - k. The Respondent is subject to I.C. § 13-30-2-1(5) (codified as I.C. § 13-7-4-1(4) at the time of the inspections) and I.C. § 13-30-2-1(5) is applicable to the facts of this matter.
 - l. The Respondent is subject to 329 IAC 10-4-2 and 329 IAC 10-4-2 is applicable to the facts of this matter.
 - m. The Respondent is subject to 329 IAC 10-4-3 and 329 IAC 10-4-3 is applicable to the facts of this matter.
 - n. The IDEM has jurisdiction over the parties and subject matter of this action.
 - o. Waste tires were located outside at the Site without a valid certificate.
 - p. Waste tires, construction/demolition debris and household waste were deposited at the Site without using a method acceptable to the solid waste management board in violation of I.C. § 13-30-2-1(4).
 - q. Waste tires, construction/demolition debris and household wastes were deposited at the Site in violation of 329 IAC 10-4-2 and/or 329 IAC 10-4-3.
 - r. Representatives of IDEM conducted inspections at the Site on July 7, July 26 and September 20, 2004, and April 11 and June 22, 2005.
 - s. Representatives of IDEM conducted inspections at the Site on May 7, 1993, July 21, 1993, and November 8, 1993.
 - t. The corrective action and civil penalty assessed by IDEM in the CO in this case are not arbitrary and capricious, and were reasonable and accurately ordered.
13. In sum, the Court's August 3, 2007 Order denied summary judgment as to whether Stidham owned the property when alleged violations were first reported in 1993, as to the amount of civil penalty and whether the civil penalty calculation included violations alleged after the October 5, 2005 CO.

**Commissioner, Indiana Department of Environmental Management,
IDEM Cause No. SW-236,**

v.

**Lloyd Stidham,
Washington, Daviess County, Indiana
2012 OEA 30, (05-S-E-3616)**

14. IDEM stated that its civil penalty calculations were made per IDEM's Civil Penalty Policy Non-rule Policy Document (Doc. 99-0002-NPD)³ for the violations. In its April 18, 2008 Proposed Findings of Fact, Conclusions of Law and Order, IDEM sought a civil penalty of \$16,875, based on moderate potential for harm, a major extent of deviation for a base level of \$11,250, and multiplied by aggravating factors in the amount of 1.5. IDEM did not apply mitigation based on Mr. Stidham's inability to pay, based on Mr. Stidham's testimony that he had received an offer to sell the property for \$250,000, an amount larger than the requested penalty. IDEM did not seek an increase for enforcement costs, as the \$20 per hour expended over at least 16 inspections taking 45 minutes to 3 hours did not exceed the requested civil penalty. IDEM did not seek an increase for the number of days of violation. IDEM identified aggravating factors of its multiple attempts over several years to cooperate with Stidham 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 Stidham enjoyed by not bringing the Site into compliance.
15. In seeking to lower or eliminate assessment of a civil penalty, Respondent Stidham presented substantial evidence that personal family and business matters affected his ability to pay, and that he had no ability to pay. However, Stidham did not provide IDEM or the Court further evidence of an inability to pay the civil penalties, such as tax returns or corporate financial statements.

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. 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. 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*

³ IDEM's Civil Penalty Policy, ID No. Enforcement 99-0002-NPD, was originally adopted on April 5, 1999 in accordance with Ind. Code § 13-14-1-11.5. At Final Hearing, the Court took official notice of the Civil Penalty Policy.

**Commissioner, Indiana Department of Environmental Management,
IDEM Cause No. SW-236,**

v.

**Lloyd Stidham,
Washington, Daviess County, Indiana
2012 OEA 30, (05-S-E-3616)**

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. Environmental management laws cited by IDEM in the CO state that no person shall deposit any contaminants upon the land in such a place and manner which creates, or which would create, a pollution hazard, or deposit, cause or allow the deposit of any contaminants or solid waste upon the land except through the use of a sanitary landfill or another method acceptable to the solid waste management board. I.C. § 13-30-2-1(3), (4) and (5) (prior to July 1, 1996 these statutes were codified as I.C. § 13-7-4-1(3), (4)); 329 IAC 10-4-2 and -3 (prior to April 13, 1996, these rules were codified at 329 IAC 2-4-2 and -3); and "open dumps", as defined in I.C. § 13-11-2-146 and -147. By substantial evidence, Stidham deposited unauthorized contaminants upon the land in such a place and manner which creates, or which would create, a pollution hazard, or deposit, cause or allow the deposit of any contaminants or solid waste upon the land except through the use of a sanitary landfill or another method acceptable to the solid waste management board, so as to constitute an open dump, all in violation of I.C. § 13-30-2-1(3), (4) and (5); 329 IAC 10-4-2 and -3; and I.C. § 13-11-2-146 and -147.

**Commissioner, Indiana Department of Environmental Management,
IDEM Cause No. SW-236,**

v.

**Lloyd Stidham,
Washington, Daviess County, Indiana
2012 OEA 30, (05-S-E-3616)**

6. IDEM met its the burden of showing, by substantial evidence, that Stidham is liable for civil penalties at the Site for depositing unauthorized contaminants upon the land in such a place and manner which creates, or which would create, a pollution hazard, or deposit, cause or allow the deposit of any contaminants or solid waste upon the land except through the use of a sanitary landfill or another method acceptable to the solid waste management board, so as to constitute an open dump, in violation of I.C. § 13-30-2-1(3), (4) and (5); 329 IAC 10-4-2 and -3; and I.C. § 13-11-2-146 and -147.

7. Respondent Stidham is subject to civil penalties for violating Indiana’s environmental management laws. “Any person who violates any provision of environmental management 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. “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).

8. IDEM’s Civil Penalty Policy Non-rule Policy Document (Doc. 99-0002-NPD) is a reasonable means of determining the civil penalty because it 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 civil penalty sought by IDEM was based on Stidham’s moderate deviation from the rules and major risk for the potential harm, and on the fact that the violations were documented over multiple inspections. Per the Civil Penalty Policy, Sec. 3.2, multi-day violations “will generally be calculated in the case of continuing violations that demonstrate a major potential for harm and/or a major extent of deviation but may be calculated in the case of other continuing violations.” In this instance, the violations were first noted on May 7, 1993, with violations alleged, proven and deemed admitted prior to issuance of the October 5, 2005 CO. Evidence of continuing violations was presented to the Court at Final Hearing on March 4, 2008. IDEM sought one violation “day”. The total civil penalty of \$16,875 penalty sought by IDEM, using a baseline penalty from the matrix midpoint, did not result in a penalty exceeding the statutory maximum of \$25,000 per day.

9. The record in this cause contains substantial evidence for the Court to apply the Civil Penalty Policy to determine the appropriate penalty in this matter. According to the policy, a civil penalty is calculated by “(1) determining a base civil penalty dependent on the severity and duration of the violation, (2) adjusting the penalty for special factors and circumstances, and (3) considering the economic benefit of noncompliance.” The base civil penalty is calculated taking into account two factors: (1) the potential for harm and (2) the extent of deviation.

**Commissioner, Indiana Department of Environmental Management,
IDEM Cause No. SW-236,**

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**Lloyd Stidham,
Washington, Daviess County, Indiana
2012 OEA 30, (05-S-E-3616)**

10. The policy states that the potential for harm may be determined by considering “the likelihood and degree of exposure of person or the environment to pollution” or “the degree of adverse effect of noncompliance on statutory or regulatory purposes or procedures for implementing the program.” Several factors that may be considered in determining the likelihood of exposure include: 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 violation. 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.
11. For the violations of I.C. § 13-30-2-1(3), (4) and (5); 329 IAC 10-4-2 and -3; and I.C. § 13-11-2-146 and -147 at the Site, the potential for harm is moderate. No fence or other barrier prevented public exposure to the solid waste on the Site. No evidence was presented that the waste was categorized for public protection during the 15 years when IDEM sought cleanup and voluntary compliance. During this time, the waste either diminished slightly, then refreshed and increased or was moved around the Site, while IDEM was given unfulfilled promises of site cleanup and compliance with environmental management laws. Substantial evidence was presented that Respondent Stidham put efforts into acquiring a purchaser or lessee, but did not progress with bringing the Site conditions closer to compliance. No evidence was presented that the onsite solid waste migrated offsite or released toxins into the environment. After IDEM issued the CO, it discovered the potential for greater environmental harm from the presence of a 55 gallon barrel of solvent or paint, and the occurrence of a fire.⁴
12. The extent of deviation for the violations is major. A large amount of solid waste was present on the Site for a lengthy amount of time, in the form of an open dump. No evidence was presented that Respondent Stidham complied with applicable regulations, over a period of nine inspections prior to the issuance of the 2005 CO, and 15 years to time of final hearing. During this time, no evidence was presented that Stidham attempted to comply to

⁴ These events occurred after the CO was issued, and will not be used to calculate a base penalty. However, it is reasonable to assume that the fire did result in air contamination in violation of Indiana’s air pollution laws, as it is reasonable to assume that a 55-gallon drum of paint or solvents presented the potential to contaminate the environment, had a release been proven.

**Commissioner, Indiana Department of Environmental Management,
IDEM Cause No. SW-236,**

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**Lloyd Stidham,
Washington, Daviess County, Indiana
2012 OEA 30, (05-S-E-3616)**

improve Site conditions. Stidham's only attempt to bring the Site into compliance was through transfer of responsibility to a purchaser or lessee. While Respondent Stidham had personal and business difficulties during challenging economic times, he made the economic decision not to comply and to continue to accept waste. Deficiencies were not cured during the litigation of this case. The extent of deviation from I.C. § 13-30-2-1(3), (4) and (5); 329 IAC 10-4-2 and -3; and I.C. § 13-11-2-146 and -147 is major.

13. According to the Civil Penalty Policy, a value for 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 Stidham's numerous contacts with IDEM reasonably should have informed him of the Site's deficiencies. The Court recognizes that Respondent Stidham's resources were limited due to various distressing business and personal family challenges during the pendency of this case. However, the onsite waste did not appreciably diminish, new waste was deposited, and Respondent Stidham expended efforts to acquire a purchaser or lessee. In this case, Respondent Stidham elected to make business decisions which gave greater support to his investments than to expenditures required for compliance with environmental regulations protective of the environment, public health and safety. Therefore, the ELJ finds that the high end of the range for a violation of moderate potential for harm and major extent of deviation ("Moderate/Major") is appropriate, resulting in a base penalty of Twelve Thousand Five Hundred Dollars (\$12,500.00) per violation day at the Site.
14. Although the civil penalty calculation allows a determination of the days of noncompliance, IDEM did not seek an increase in penalty for this factor. Substantial evidence shows that violations were first observed on May 7, 1993, then on eight more times in 1993, 1994, 2004 and 2005, prior to the October 5, 2005 issuance of the CO, and substantial evidence was presented that the Site remained noncompliant as of the March 24, 2008 final hearing. Prior to its issuance of the CO, IDEM documented four years when the Site was not in compliance: 1993, 1994, 2004 and 2005. In this case, the Court will not impose an increase in penalty when the agency which issued the violation did not seek such an increase.
15. The base civil penalty value may be adjusted for aggravating or mitigating Penalty Adjustment Factors. *See Sec. 4.* The Penalty Adjustment Factors are: (1) actions before the violations; (2) actions after the violation reflecting good faith efforts and cooperation/noncooperation; (3) history of noncompliance; (4) ability to pay; (5) other unique factors; (6) IDEM enforcement costs, and economic benefit of noncompliance, *Sec. 5.*
16. No adjustment will be made for factor (1), actions before the violation, for lack of substantial evidence prior to the first inspection report in 1993.

**Commissioner, Indiana Department of Environmental Management,
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Washington, Daviess County, Indiana
2012 OEA 30, (05-S-E-3616)**

17. Maximum adjustment in aggravation of 50 percent for factor (2), actions after the violation reflecting good faith efforts and cooperation/noncooperation, is supported by substantial evidence of Respondent Stidham's continuing to accept waste and continuing not to bring the site into compliance, despite having control over cooperation, and a significant amount of time to remedy the Site.
18. Maximum adjustment of 100 percent in aggravation for factor (3), history of noncompliance, is supported by substantial evidence of the 15 years of noncompliance with numerous similar violations after Respondent Stidham was first notified of alleged violations in 1993, and of attempted negotiations of a prior NOV for the same conditions at the same Site. Respondent Stidham did not execute a settlement in this case in the 15 years preceding final hearing, despite attempting to find purchasers, lessees, or issuing unfulfilled promises of compliance.
19. Ability to pay, factor (4) results in neither aggravating nor mitigation factor, as testimony (without documentary proof) demonstrated an offset between Respondent Stidham's allegations that he had limited means and business and personal difficulties, and his expectation that the Site would sell for \$250,000.
20. IDEM enforcement costs, factor (5), were not supported by substantial evidence of expense to collect special data or information. IDEM did not seek an adjustment in civil penalty, as its expenses of its inspector's wages did not exceed the penalty sought. For lack of substantial evidence, the civil penalty applied to Respondent Stidham will not be adjusted for IDEM enforcement costs.
21. Other unique factors, factor (6), allows a civil penalty to be adjusted for "unanticipated circumstances that arise after the calculation and assessment of the civil penalty" such as "additional evidence . . . of the facts surrounding a violation" or "[o]ther unforeseen circumstances or information". Substantial evidence shows that after IDEM assessed a civil penalty in its 2005 CO, that a 55 gallon drum of paint or solvent was discovered on the Site. In October, 2007, the waste caught fire. The Site's condition, demonstrated in photographic evidence, shows that neither of these subsequent factors were reasonably unanticipated. Although Respondent Stidham may not have foreseen that the numerous sale or lease transactions would fail, these business transaction failures are not of the type contemplated by factor (6). By substantial evidence, unique factors stated in factor (6) do not support an adjustment of the civil penalty.
22. Substantial evidence of economic benefit to Stidham is found in his continuing to receive waste without incurring the expense of proper site remediation. Respondent Stidham's allegations of inability to pay are not supported by documentation such as tax returns, and he continued to seek purchasers or lessees. As waste continued to be received at the Site, it is reasonable to infer that Respondent Stidham received income for the ongoing waste stream. By failing to bring the Site into compliance, Respondent Stidham delayed or avoided costs.

**Commissioner, Indiana Department of Environmental Management,
IDEM Cause No. SW-236,**

v.

**Lloyd Stidham,
Washington, Daviess County, Indiana
2012 OEA 30, (05-S-E-3616)**

However, for lack of substantial evidence, the Court finds no further adjustment to the base civil penalty for economic benefit.

23. Respondent Lloyd Stidham, with property at the junction of State Roads 56 and 3, Blocher, Scott County, Indiana 303 East Main Street, Paoli, Orange County, Indiana containing unauthorized solid waste, is assessed a total civil penalty of Twenty Five Thousand Dollars (\$25,000). By substantial evidence, Respondent Stidham violated environmental management laws stated at 329 IAC 10-4-2⁵, 329 IAC 10-4-3, I.C. § 13-30-2-1(3), I.C. § 13-30-2-1(4), I.C. § 13-30-2-1(5), 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), and violated laws applicable to “open dumps”, as defined in I.C. § 13-11-2-146 and -147. Except for amount of civil penalty, the October 5, 2005 Commissioner’s Order is sustained in all other respects.
24. 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 immediately cease and desist violation of I.C. § 13-30-2-1(3), (4) and (5), and 329 IAC 10-4-2 and -3.
 - b. Within thirty (30) days of the Effective Date of this Order, Respondent Stidham shall remove and dispose of all solid waste at a state approved solid waste management facility.
 - c. Respondent Stidham shall use a registered waste tire transporter to transport the tires to a state approved solid waste management facility, within thirty (30) days of the Effective Date of this Order.
 - d. Within thirty (30) days of the Effective Date of this Order, Respondent Stidham shall submit documentation that a hazardous waste determination has been made on any 55 gallon drums at the Site. If the results of this determination indicate that the material is a hazardous waste, Respondent Stidham shall dispose of this waste in compliance with all regulatory requirements.
 - e. Within forty (40) days of the Effective Date of this Order, Respondent Stidham shall submit documentation to IDEM as proof of proper disposal of all solid waste. The documentation shall include waste tire manifests and disposal receipts.
25. Respondent Lloyd Stidham is assessed a civil penalty of Twenty-Five Thousand Dollars (\$25,000). This penalty amount shall be remitted to the Department of Environmental Management within thirty (30) days of the Effective Date of this Order. Checks shall be made payable to Environmental Management Special Fund, with the Cause Number (05-S-E-3616) indicated on the check(s) and mailed to:

⁵ These violations were codified in section 2 instead of section 10 at the time of inspections; e.g., 329 IAC 2-4-2 instead of 329 10-4-2).

**Commissioner, Indiana Department of Environmental Management,
IDEM Cause No. SW-236,**

v.

**Lloyd Stidham,
Washington, Daviess County, Indiana
2012 OEA 30, (05-S-E-3616)**

Cashier
IDEM
100 North Senate Avenue
P. O. Box 7060
Indianapolis, IN 46207-7060

26. All submittals required by this Order, unless notified otherwise in writing, shall be made in accordance with the directions contained in the October 5, 2005 Notice and Order of the Commissioner of the Indiana Department of Environmental Management.
27. Respondent Lloyd Stidham shall provide a copy of this Order, if in force, to any subsequent owners or successors before ownership or entry rights are transferred. Respondent shall ensure that all contractors, firms, and other persons performing work under this Order comply with the terms of this Order.

FINAL ORDER

For all of the foregoing reasons, **IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that by substantial evidence, the Respondent, Lloyd Stidham, with property at the junction of State Roads 56 and 3, Blocher, Scott County, Indiana 303 East Main Street, Paoli, Orange County, Indiana containing unauthorized solid waste, violated environmental management laws stated at 329 IAC 10-4-2⁶, 329 IAC 10-4-3, I.C. § 13-30-2-1(3), I.C. § 13-30-2-1(4), I.C. § 13-30-2-1(5), 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), and violated laws applicable to “open dumps”, as defined in I.C. § 13-11-2-146 and -147. Respondent, Lloyd Stidham, is assessed a total civil penalty of Twenty Five Thousand Dollars (\$25,000). Except for amount of civil penalty, the October 5, 2005 Commissioner’s Order is **AFFIRMED, subject to the following Order:**

- a. Respondent Stidham shall immediately cease and desist violation of I.C. § 13-30-2-1(3), (4) and (5), and 329 IAC 10-4-2 and -3.
- b. Within thirty (30) days of the Effective Date of this Order, Respondent Stidham shall remove and dispose of all solid waste at a state approved solid waste management facility.
- c. Respondent Stidham shall use a registered waste tire transporter to transport the tires to a state approved solid waste management facility, within thirty (30) days of the Effective Date of this Order.

⁶ These violations were codified in section 2 instead of section 10 at the time of inspections; e.g., 329 IAC 2-4-2 instead of 329 10-4-2).

**Commissioner, Indiana Department of Environmental Management,
IDEM Cause No. SW-236,**

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**Lloyd Stidham,
Washington, Daviess County, Indiana
2012 OEA 30, (05-S-E-3616)**

- d. Within thirty (30) days of the Effective Date of this Order, Respondent Stidham shall submit documentation that a hazardous waste determination has been made on any 55 gallon drums at the Site. If the results of this determination indicate that the material is a hazardous waste, Respondent Stidham shall dispose of this waste in compliance with all regulatory requirements.
- e. Within forty (40) days of the Effective Date of this Order, Respondent Stidham shall submit documentation to IDEM as proof of proper disposal of all solid waste. The documentation shall include waste tire manifests and disposal receipts.

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 25th day of June, 2012.

Hon. Mary L. Davidsen
Chief Environmental Law Judge