

Commissioner, Indiana Department of Environmental Management
v.
Nicola Haddad d/b/a Marathon Gas Station, IDEM Case No. 2010-19215-S
Hobart, Lake County, Indiana
2013 OEA 59, (11-S-E-4504)

OFFICIAL SHORT CITATION NAME: When referring to 2013 OEA 59 cite this case as
Nicola Haddad, 2013 OEA 59.

TOPICS:

underground storage tank (UST)	Civil Penalty Policy
gas station facility	Non-rule policy document ID No.
owner	Enforcement 99-00021-NPD
operator	base civil penalty
monthly leak detection	potential for harm
monthly release detection	extent of deviation
automatic tank gauging system	days of non-compliance
Agreed Order	I.C. § 13-23-1-2
Commissioner's Order	I.C. § 13-23-14-2, -3
default	329 IAC 9-7-2(1)
civil penalty	<i>Great Barrier Insulation</i> , 2005 OEA 57
Penalty Policy for Underground Storage	<i>Scherb</i> , 2006 OEA 16
Tank/Leaking Underground Storage Tank	<i>Landers</i> , 2009 OEA 109
Requirements	<i>McClure Oil</i> , 2009 OEA 126
Non-rule policy document ID No.	<i>Singh</i> , 2011 OEA 44
Enforcement 99-0001-NPD	

PRESIDING JUDGE:

Mary L. Davidsen

PARTY REPRESENTATIVES:

IDEM: Julie E. Lang, Esq.
Respondent: Steve E. Haddad, Esq.

ORDER ISSUED:

November 14, 2013

INDEX CATEGORY:

Land

FURTHER CASE ACTIVITY:

[none]

Commissioner, Indiana Department of Environmental Management
v.
Nicola Haddad d/b/a Marathon Gas Station, IDEM Case No. 2010-19215-S
Hobart, Lake County, Indiana
2013 OEA 59, (11-S-E-4504)

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. 2010-19215-S)
Complainant,)
))
v.) Cause No. 11-S-E-4504
))
NICOLA HADDAD, d/b/a MARATHON GAS STATION,))
Hobart, Lake County, Indiana,)
Respondent)

FINDINGS OF FACT, CONCLUSIONS OF LAW and FINAL ORDER

This matter came before the Office of Environmental Adjudication (“OEA” or “Court”) for final consideration of evidence, as to the penalties to be assessed against Respondent, Nicola Haddad, d/b/a Marathon Gas Station, 428 Main Street, Hobart, Lake County, Indiana (“Respondent Haddad”), for lack of conducting an appropriate method of the gas station’s monthly leak detection on its underground storage tank system. Respondent Haddad, disputed liability, as he leased the business he co-owned to a third party. Default judgment was entered against Respondent Haddad for his eventual failure to participate in litigation. On the Court’s request, the Indiana Department of Environmental Management (“IDEM”) submitted written evidence in support of its Commissioner’s Order alleging violations at the gasoline station and seeking imposition of penalty. 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. Respondent, Nicola Haddad’s June 4, 2004 Notification for Underground Storage Tanks certified to IDEM that he owned a gasoline station with four underground storage tanks (UST) and UST systems at 428 Main Street, Hobart, Lake County, Indiana (“Station”). The UST system’s monthly leak detection methodology is the subject of this administrative cause. IDEM Notification for Underground Storage Tank form was signed by Respondent Haddad, listing him as the station’s UST “Operator” and “Contact at Tank Location”. *IDEM*

Commissioner, Indiana Department of Environmental Management

v.

**Nicola Haddad d/b/a Marathon Gas Station, IDEM Case No. 2010-19215-S
Hobart, Lake County, Indiana
2013 OEA 59, (11-S-E-4504)**

August 16, 2013 Submission of Evidence, Ex.1 (“IDEM Evid.”), Affidavit of Sherri Bass, IDEM Office of Land Quality Enforcement Case Manager; Ex. A.

2. In his August 22, 2011 Petition for Administrative Review (“Petition”), Respondent Haddad stated:

Nicola Haddad is the co-owner of the building and owner of the business located at 428 Main Street, Hobart, Lake County, Indiana, which was leased to a third party, UTM, Inc. Nicola Haddad has not operated the Gas station for several years now.

Nicola Haddad was not the operator of the gas station. The gas station was operated by UTM, Inc. under the control of Mr. Arshad Sayed since November 1, 2008. Mr. Arshad Sayed subsequently purported to sell the business to another person since December 24, 2010. Mr. Haddad is currently only the landlord. The lease and subsequent sale document is hereby attached as Exhibit A.

Exhibit A contained the August 9, 2011 Notice and Order of the Commissioner of the Department of Environmental Management (“CO”). No other documents were attached to the Petition, nor were any offered by Respondent Haddad during the course of this case.

3. On March 9, 2010, the Station was inspected by IDEM UST inspector Robert Strimbu. *IDEM Evid. Ex. B, Strimbu Affidavit and Attachment Strimbu-1.* Inspector Strimbu discovered that the three operating tanks were not being monitored monthly for leak detection using any of the applicable methods required by rule (329 IAC 9-7-2-(1), § (4)(4) through (4)(8). *Id.* Although the tanks had low fuel levels, the leak detection tests performed by Inspector Strimbu failed. *Id.* IDEM notified Respondent Haddad of these alleged violations in its March 29, 2010 Violation Letter. *IDEM Evid. Ex. B, Strimbu Affidavit and Attachment Strimbu-2.* The March 29, 2010 Violation Letter was addressed to Respondent Haddad and transmitted via certified mail. *Id.* The certified mail receipt was signed as received on April 1, 2010. *Id.* Although the Court cannot clearly read the full printed and signed name on the certified mail receipt, the first name is Arshad. *Id.* Although IDEM sent a draft Agreed Order to Respondent Haddad on July 29, 2010, *Id., Ex. C*, the parties did not enter into an Agreed Order to resolve these issues with IDEM.
4. IDEM, by Enforcement Case Manager Sherri Bass, issued a Commissioner’s Order for the Station (“CO”) on August 9, 2011. *IDEM Evid, Ex. D; Respondent Haddad’s Petition, Ex. A.* The CO was sent to Respondent Haddad at 1870 Berry Lane, Des Plaines, IL, 60018, *IDEM Evid. Ex. D*, the same address listed as Respondent Haddad’s residence on his Petition. *Respondent Haddad’s Petition, p. 1, enumerated ¶ 1.*
5. As of July 15, 2013, the Station continued to be noncompliant with leak detection requirements; the Automatic Tank Gauging system selected to be used by Respondent was not functioning. *IDEM Evid., Ex. 2.*

Commissioner, Indiana Department of Environmental Management

v.

**Nicola Haddad d/b/a Marathon Gas Station, IDEM Case No. 2010-19215-S
Hobart, Lake County, Indiana
2013 OEA 59, (11-S-E-4504)**

6. This cause is the subject of Respondent Haddad's timely August 22, 2011 Petition for Administrative Review of the Commissioner's Order. Respondent Haddad's legal counsel appeared at the September 19, 2011 Prehearing Conference, and represented that the Station had new ownership, but requested additional time to submit leak detection information to IDEM. At the parties' request, the matter proceeded to periodic written status advisal submissions in the form of Status Reports. The parties were ordered to submit a Status Report by November 21, 2011 in the Court's September 19, 2011 Report of Prehearing Conference and Order to Submit Status Report. After a file review noted that the Court had not received the November 21, 2011 Status Report, the Court's February 14, 2012 Order for Status Report advised that the matter would be defaulted if a status report was not filed by February 28, 2012. The parties filed a March 8, 2012 Status Report, submitted and signed by Respondent Haddad's legal counsel. The March 8, 2012 Status Report stated that "Tenant has submitted leak detection tests to IDEM through our office to Sherri Bass, however we have not received a response back as to whether or not it was sufficient." In its March 9, 2012 response, the Court ordered the parties to submit as status report by May 24, 2012. Respondent Haddad's legal counsel submitted a May 23, 2012 Status Report, which noted, **"It has come to our attention that this station may not be operational at this time. This issue did not exist prior to this day. We placed a call to our client and as of today, we have not received a response yet."** (Emphasis original). In its June 5, 2012 response, the Court ordered the parties to submit a status report by July 9, 2012. No such status report was filed. On March 18, 2013, IDEM filed a substitution of legal counsel.
7. The litigation track toward Respondent Haddad's default began with IDEM's May 3, 2013 Motion for Default. The Court's May 7, 2013 Notice of Proposed Order of Default advised Respondent Haddad that:

"[a]fter issuing a Default Order, the Environmental Law Judge shall conduct any further proceeding necessary to complete the proceeding without the participation of the party dismissed and shall determine all issues in the adjudication, including those affecting the persons dismissed.

Along with the Court's June 5, 2013 Final Order of Default, all of these documents were served on Respondent Haddad by his legal counsel.
8. The Court's June 5, 2013 Final Order of Default included an Order Scheduling Status Conference for July 11, 2013, 10:00 AM, EDT. Neither Respondent Haddad nor his legal counsel attended. As noted in the Court's July 12, 2013 Report of Status Conference and Order to Submit Proposed Case Schedule, IDEM's legal counsel and the Court discussed subsequent procedures. Although IDEM disputed whether the Court retained jurisdiction or was authorized to conduct further fact-finding, on August 16, 2013, IDEM complied with the Court's order to submit evidence concerning whether the alleged violation occurred, and as to appropriate remedy.

Commissioner, Indiana Department of Environmental Management

v.

**Nicola Haddad d/b/a Marathon Gas Station, IDEM Case No. 2010-19215-S
Hobart, Lake County, Indiana
2013 OEA 59, (11-S-E-4504)**

9. The Court received no additional submissions or requests to participate from Respondent Haddad, beyond those noted above.
10. IDEM's Bass based IDEM's calculation of civil penalty on the civil penalty policy adopted as a Non-Rule Policy Document, Penalty Policy for Underground Storage Tank / Leaking Underground Storage Tank Requirements, posted at http://www.in.gov/idem/files/nrpd-enf_0002.pdf. *Ex. 1, Affidavit of Sherri Bass; Ex. E.* IDEM determined that the civil penalty to be imposed should be based upon a minor potential for harm "because the failed leak detection tests were due to low fuel levels in the tank[s]." *Id.* IDEM determined that the alleged violation provided a moderate extent of deviation from the applicable regulatory rules because there were three missing or inconclusive tests in one year. *Id.*
11. IDEM apparently determined that 1 violation day was appropriate to determine that a multiplier of 1 applied in calculating the civil penalty. *Id.* However, 2 days of violations were documented during two inspections, dated March 29, 2010 and July 15, 2013. Documentation of the violations during two inspections over a year apart provides substantial evidence that the two Stations continued in noncompliance for more than 365 days. Per the Penalty Policy for Underground Storage Tank / Leaking Underground Storage Tank Requirements, Sec. II, observance of the two violations more than 365 days apart provides substantial evidence that two violation days should serve as a multiplier of the base civil penalty calculation.
12. IDEM's civil penalty calculation was based on attributing one tank penalty for the three tanks for the Station. *IDEM Evid., Ex. B, Strimbu-1, Ex. Ex. 2.*
13. Based on calculations conducted per the Penalty Policy for Underground Storage Tank / Leaking Storage Tank Requirements, IDEM's Bass calculated a base civil penalty of Three Thousand Three Hundred Dollars (\$3,300) for the Station. *IDEM Evid., Ex. E.* In its CO, IDEM also ordered Respondent Haddad to immediately cease and desist operating in violation of 329 IAC 9-7-2(1), and, within sixty days of the CO's effective date, required Respondent Haddad to submit passing monthly leak detection tests for all tanks to IDEM, and thereafter submit passing tests every month for six consecutive months. *IDEM Evid., Ex. D, Order, ¶¶1, 2.*
14. No further evidence was provided by either party.

CONCLUSIONS OF LAW

Commissioner, Indiana Department of Environmental Management

v.

**Nicola Haddad d/b/a Marathon Gas Station, IDEM Case No. 2010-19215-S
Hobart, Lake County, Indiana
2013 OEA 59, (11-S-E-4504)**

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 Ind. Code § 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.* OEA is subject to procedures stated in I.C. § 4-21.5-3, *et seq.*, and 315 IAC 1, *et seq.*
2. This is a Final Order issued pursuant to I.C. § 4-21.4-3-27. Findings of Fact that may be construed as Conclusions of Law and Conclusions of Law that may be construed as Findings of Fact are so deemed.
3. 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 Envntl. 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. IDEM disputes whether OEA has jurisdiction to conduct additional fact-finding when an alleged violator defaults on a case where IDEM seeks to enforce a Commissioner’s Order (“CO”). Per IDEM, the CO should be entered as a Final Order without fact-finding. As advised in the Court’s May 17, 2013 Report of Status Conference and Order to Submit Proposed Case Schedule, OEA is required to conduct further proceedings to conclude this case, as IDEM seeks the remedies of an imposition of penalty, system testing and reporting, and a cease and desist order:

Commissioner, Indiana Department of Environmental Management

v.

**Nicola Haddad d/b/a Marathon Gas Station, IDEM Case No. 2010-19215-S
Hobart, Lake County, Indiana
2013 OEA 59, (11-S-E-4504)**

Should IDEM seek the Court's entry of its CO, further evidence must be presented on the record, per Indiana Rule of Trial Procedure 55(B): "If, in order to enable the court to enter judgment or to carry it into effect, . . . it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearing or order such references as it deems necessary and proper" The Appellate Court in *Stewart v. Hicks*, 182 Ind. App. 308; 395 N.E.2d 308, (Ind. App. 1979) stated, "First, we note that default judgments actually consist of two stages in cases of this type: (1) the entry of default and (2) the entry of appropriate relief including damages." The Court, in *Stewart*, held that it is appropriate to hold a hearing on the matter of damages if the amount is uncertain. In the *Stewart* case, the plaintiff sued under a sales contract for damages. The defendant had agreed to sell the plaintiff a liquor license for \$12,000 or \$13,000. The plaintiff requested \$50,000 in damages in his complaint. After finding the Defendant in default, the trial court awarded the plaintiff \$50,000. No hearing was held on the amount of damages. The appellate court overturned this award saying "Judgment was entered without a hearing in the amount of \$50,000.00, an amount approximately four times that of the contract price involved. There were no allegations in the complaint which could conceivably have supported damages in the amount of \$ 50,000.00." *Stewart v. Hicks* at 316.

In *Stewart*, the complaint did not specify the grounds for awarding the plaintiff \$50,000. In the case before the OEA, the CO does not specify how the penalty amount was calculated, or whether its request for a cease and desist order is appropriate. At this stage in the case against Haddad, IDEM has not had the opportunity to present evidence beyond the allegations made in the CO to support the assessment of the civil penalty and demand for a cease and desist order. As this ELJ must apply a *de novo* review, this does not constitute sufficient facts to conclude that the civil penalty and cease and desist order sought by the IDEM in the CO is appropriate.

6. IDEM inspections provide substantial evidence that Respondent Haddad committed the violations alleged in IDEM's CO. One June 14, 2004, Respondent Haddad certified, under penalties for perjury, that he was the Stations owner and operator. *IDEM Evid. Ex. A*. Respondent Haddad's allegations pled in his Petition that the Station had been transferred so as to relieve his responsibility were not supported by any evidence. Respondent Haddad elected to use the method of Automatic Tank Gauging for required periodic leak detection. IDEM's two inspections, on March 9, 2010 and on July 15, 2013, showed that the three operating tanks were not being monitored monthly for release detection using any of the applicable methods required by rule (329 IAC 9-7-2-(1), § (4)(4) through (4)(8)). Both times, the leak detection tests performed by Inspector Strimbu failed. By substantial evidence, Respondent Haddad violated 329 IAC 9-7-2(1).

Commissioner, Indiana Department of Environmental Management

v.

**Nicola Haddad d/b/a Marathon Gas Station, IDEM Case No. 2010-19215-S
Hobart, Lake County, Indiana
2013 OEA 59, (11-S-E-4504)**

7. Respondent Haddad 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. Haddad 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).
8. 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) 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't'l Mgmt. v. Carson Stripping, Inc. and Carson Laser, Inc.*, 2004 OEA 14, 26, *citing Ind. Dep't of Env't'l 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't'l 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 Respondent Haddad's moderate deviation from the rules and minor risk for the potential harm, on the facts that the failed leak detection tests were due to low fuel levels in the three tanks, and the absence of three missing or inconclusive tests in one year (2010). And, the violations were present in 2013. IDEM applied its calculation to the one station, but not to three tanks. Per the UST/LUST Penalty Policy, Sec. II, violations continuing for longer than 365 days to a day for each year, in this instance, two days for each station. The station was assigned a penalty amount and no multiplier for "violation days" was applied, accounting for the total \$3,300 penalty. This amount does not result in a penalty exceeding the statutory maximum of \$10,000 per tank per day.
9. 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.

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, were both originally adopted on April 5, 1999 in accordance with Ind. Code § 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."

Commissioner, Indiana Department of Environmental Management

v.

**Nicola Haddad d/b/a Marathon Gas Station, IDEM Case No. 2010-19215-S
Hobart, Lake County, Indiana
2013 OEA 59, (11-S-E-4504)**

10. 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. In *Baldev Singh*, 2011 OEA 44, for violations based on no monitoring of four gas station tanks at two facilities in the Great Lakes basin, without a reported spill, the Court selected moderate potential for harm and a major deviation, with the high point in the matrix applied.
11. For the violations of 329 IAC 9-7-2(1) at the three tanks at the one station, the potential for harm is minor. 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. Although it remains unknown whether the USTs have leaked, IDEM’s leak detection testing results showed the systems had low fuel levels. No evidence was presented that product migrated offsite, into drinking water or into the environment. But, the potential for harm in the event of a release is significant, as the station is in a sensitive environmental watershed, the Great Lakes basin. 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 Haddad or IDEM to determine whether equipment is operating properly or failing, and to respond appropriately.

Commissioner, Indiana Department of Environmental Management

v.

**Nicola Haddad d/b/a Marathon Gas Station, IDEM Case No. 2010-19215-S
Hobart, Lake County, Indiana
2013 OEA 59, (11-S-E-4504)**

12. The extent of deviation for the violations of 329 IAC 9-7-2 (1) is moderate. Respondent Haddad elected to conduct required monitoring through an automatic tank gauging system, but the systems did not function. No evidence was presented that the automatic tank gauging system functioned while IDEM was alleging deficiencies, from the period when the first inspection presented in evidence, March 9, 2010, to the last on July 15, 2013. The extent of deviation from 329 IAC 9-7-2 (1) is moderate.

13. 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 Haddad affirmed in 2004 that he was owner and operator, and repeated communications since 2010 from IDEM apprised him that IDEM intended to seek enforcement action, based on its belief that testing was required. Respondent Haddad’s contentions presented to the Court in his pleadings show that Respondent Haddad believed that the facility may not have been in operation, which may have inferred that there was nothing to monitor.² Therefore, the ELJ finds that the moderate end, or midpoint of the range for a UST violation of minor potential for harm and moderate extent of deviation (“Minor/Moderate”) is appropriate, resulting in a penalty of Two Thousand Seven Hundred Fifty Dollars (\$2,750.00) per violation day, for each tank.

14. The next step in civil penalty calculation is a determination of the days of noncompliance. IDEM investigations provide substantial evidence that monthly release detection required in 329 IAC 9-7-2(1) was observed on March 9, 2010 and on July 15, 2013, a period extending beyond 365 days. Although monthly release detection might occur on one day per month, resulting in noncompliance for 12 days in a year, a review of the applicable regulations infers the intent to construe the monthly detection obligation as extending throughout the month and not limited to a particular day. Therefore, by substantial evidence, noncompliance for all three tanks extended beyond 365 days for monthly release detection. It is reasonable to assume that the three tanks were noncompliant for the entire intervening period, but IDEM did not present evidence that the days of noncompliance extended beyond at least 365 days. In this case, the Court elects to calculate the days of annual noncompliance as more than 365 days. The UST Civil Penalty Policy provides a multiplier of two (2) for over 365 days of noncompliance, for a base civil penalty of Five Thousand Five Hundred Dollars (\$5,500.00) for each of the three tanks at the Station.

² As IDEM did not seek enforcement based on whether Respondent Haddad complied with tank closure requirements, the Court, for lack of evidence, will do likewise.

Commissioner, Indiana Department of Environmental Management

v.

**Nicola Haddad d/b/a Marathon Gas Station, IDEM Case No. 2010-19215-S
Hobart, Lake County, Indiana
2013 OEA 59, (11-S-E-4504)**

15. IDEM's civil penalty calculation was based on attributing one tank the Station, although inspection reports for the Station show three tanks. Substantial evidence supports a finding that the violation applied to all three tanks. By substantial evidence, the three tanks at the one Station are subject to the base civil penalty of \$5,500, for a base civil penalty for each tank of \$5,500.
16. The base civil penalty value may be adjusted by aggravating or mitigating factors. 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.
17. Respondent Nicola Haddad, d/b/a Marathon Gas Station at 428 Main Street, Hobart, Lake County, Indiana is assessed a total civil penalty of Sixteen Thousand Five Hundred Dollars (\$16,500) for the violations of 329 IAC 9-7-2(1), as adopted per I.C. § 13-23-1-2, and IDEM's August 9, 2011 Commissioner's Order is sustained in all other respects.
18. Within thirty days of this Order, Respondent Haddad is to begin using a form of monthly release detection that complies with all of the requirements of 329 IAC 9-7-2(1). Respondent Haddad shall submit documentation of all monthly release detection monitoring results to IDEM for twelve months after the date of this Order.

FINAL ORDER

For all of the foregoing reasons, **IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that the Respondent, Nicola Haddad, d/b/a Marathon Gas Station at 428 Main Street, Hobart, Lake County, Indiana, violated 329 IAC 9-7-2(1). Respondent, Nicola Haddad is subject to civil penalties of Sixteen Thousand Five Hundred Dollars (\$16,500) for violating Indiana's environmental management laws. Except for the amount of civil penalty, the Indiana Department of Environmental Management's August 9, 2011 Commissioner's Order is **AFFIRMED**. Within thirty days of this Order, Respondent Haddad is to begin using a form of monthly release detection that complies with all of the requirements of 329 IAC 9-7-2(1), and shall submit documentation of all monthly release detection monitoring results to IDEM for twelve months after the date of this Order.

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.

Commissioner, Indiana Department of Environmental Management
v.
Nicola Haddad d/b/a Marathon Gas Station, IDEM Case No. 2010-19215-S
Hobart, Lake County, Indiana
2013 OEA 59, (11-S-E-4504)

IT IS SO ORDERED in Indianapolis, Indiana this 14th day of November, 2013.

Hon. Mary L. Davidsen
Chief Environmental Law Judge