

# INDIANA OFFICE OF ENVIRONMENTAL ADJUDICATION

Mary L. Davidsen, *Chief Environmental Law Judge*  
Lori Kyle Endris, *Environmental Law Judge*  
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## COMMISSIONER, INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

CASE NO. 2019-26726-S

AILENA LYNN DANITA

2022 OEA 026, CAUSE NO. 20-S-E-5131

<b>Official Short Cite Name:</b>	Danita 2022 OEA 026
<b>OEA Cause No.:</b>	20-S-E-5131
<b>Topics/Keywords:</b>	IC 13-11-2-57(a) IC 13-11-2-146 IC 13-11-2-205.5 IC 13-11-2-251 IC 13-13-1 IC 13-14-2-2 IC 13-30-3-5 IC 13-30-3-9 IC 13-30-4-1 315 IAC 1-3-3(d) 329 IAC 10-2-174 329 IAC 10-4-2 329 IAC 10-4-4(a) 329 IAC 15-2-13 329 IAC 15-3-2 329 IAC 15-3-5 IDEM jurisdictional authority over Indiana Home Rule Civil Penalty Non-Rule Policy Open dumping / miscellaneous solid waste Waste tire storage site Waste tire processing operation
<b>Presiding ELJ:</b>	LORI KYLE ENDRIS
<b>Party Representatives:</b>	JULIE LANG, ESQ., IDEM AILENA DANITA, PRO SE, PETITIONER
<b>Order Issued:</b>	MAY 24, 2022
<b>Index Category:</b>	ENFORCEMENT
<b>Further Case Activity:</b>	

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STATE OF INDIANA )  
)  
COUNTY OF MARION )  
)  
IN THE MATTER OF: )

BEFORE THE INDIANA OFFICE OF  
ENVIRONMENTAL ADJUDICATION

CAUSE NO. 20-S-E-5131

COMMISSIONER, INDIANA DEPARTMENT OF )  
ENVIRONMENTAL MANAGEMENT, )  
CASE NO. 2019-26726-S )  
Complainant )  
)  
v. )  
)  
AILENA LYNN DANITA (nee GASTINEAU) et al. )  
LYONS, GREENE COUNTY, INDIANA, )  
Respondent. )

## FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

This matter came before the Office of Environmental Adjudication (OEA) for the evidentiary hearing, March 3, 2002, on the Notice and Order of the Commissioner of the Department of Environmental Management (IDEM). The presiding Environmental Law Judge (ELJ) having heard the testimony, reviewed the evidence and read the record now enters the following findings of fact, conclusions of law and final order.

### FINDINGS OF FACT

1. Respondent James Gastineau owns an undivided one-third (1/3) interest, Respondent Jennie Redenbaugh owns an undivided one-third (1/3) interest, and Respondents Leta Corbin and Jena Jordan each own an undivided one-sixth (1/6) interest (collectively Owners) of the property located at 485 S 750 W, Lyons, Greene County, Indiana (Site).<sup>1</sup>

2. With the permission of James Gastineau, Respondent Ailena Gastineau née Ailena Danita (Respondent) occupied a portion of the Site to build an Earthship home.<sup>2</sup> An Earthship is

<sup>1</sup> Petition for Administrative Review, pp. 2 - 3.

<sup>2</sup> *Id.* at p. 2.

a type of passive solar house made of both natural and upcycled materials such as earth-packed tires.

3. Following IDEM's receipt of Complaint/RM 84514, IDEM Solid Waste Compliance Inspector Kaye Driskill conducted an inspection of the Site on January 4, 2019, and on January 15, 2019 issued a Violation Letter (VL) and Inspection Report (Report). Attached to the Report were photographs of tires and miscellaneous solid waste.<sup>3</sup>

4. Inspector Driskell conducted a second inspection on April 2, 2019 and issued a VL and Report on April 5, 2019 with attached photographs of tires and miscellaneous solid waste at the Site.<sup>4</sup> On May 29, 2019, she conducted a third inspection and issued a VL and Report on August 14, 2019, with attached photographs of tires and miscellaneous solid waste.<sup>5</sup>

5. Inspector Driskell, accompanied by IDEM Inspectors Tim Hotz and David Woosley, conducted a fourth inspection October 17, 2019. During this inspection, the Report referenced miscellaneous solid waste, and included a chart showing Inspector Woosley's individual count of 916 passenger tires, 430 Semi Tires and 14 Agricultural Tires (3,486 PTEs).<sup>6</sup> Following this inspection, Nicholas Carr, IDEM Director of the Southwest Regional Office issued a Summary Letter/Referral to Enforcement (Referral) on October 30, 2019.<sup>7</sup>

6. At the hearing, Inspector Hotz testified that he personally observed miscellaneous solid waste on the ground during the October 2019 inspection and that the photographs attached to the Referral fairly and accurately depicted the miscellaneous solid waste.<sup>8</sup> He further testified that he observed tires stored uncovered and unprotected from precipitation events, and that the photographs attached fairly and accurately depicted the tires.<sup>9</sup>

7. On January 2, 2020, The Greene County Superior Court issued an Order Granting Owners' Request for a Preliminary Injunction to prevent Respondents James Gastineau and Ailena Danita from entering the Site.

8. On April 15, 2020, Inspector Driskill and Inspector Hotz again inspected the Site. The Report stated the "[m]iscellaneous solid waste has been removed" and "[n]o evidence of removal of waste tires was observed."<sup>10</sup> On April 24, 2020, the Site was again referred to enforcement.<sup>11</sup> At the hearing, Inspector Hotz testified that the photographs attached to this Summary Letter/Referral to Enforcement were fair and accurate representations of the tires as he observed them.<sup>12</sup> Inspector Hotz also testified he observed evidence of waste tire

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<sup>3</sup> IDEM Exhibit 1, January 15, 2019 Violation Letter and Inspection Report, VFC No. 82675210.

<sup>4</sup> IDEM Ex. 2, April 15, 2019, Violation Letter and Inspection Report, VFC No. 82755713.

<sup>5</sup> IDEM Ex. 3, August 14, 2019 Violation Letter and Inspection Report, VFC No. 82825525.

<sup>6</sup> IDEM, Ex. 4, October 30, 2019 Summary Letter/Referral to Enforcement, VFC No. 82857669.

<sup>7</sup> *Id.*

<sup>8</sup> Hearing Transcript, pp. 14 – 15.

<sup>9</sup> *Id.*, p. 19.

<sup>10</sup> IDEM Ex. 5, April 24, 2020 Summary Letter/Referral to Enforcement, VFC No. 82955388.

<sup>11</sup> *Id.*

<sup>12</sup> Tr. p. 21.

processing and the presence of larger tires during this inspection.<sup>13</sup>

9. A timely Notice of Violation was issued to all Respondents on June 12, 2020.<sup>14</sup> The NOV cited violations of the waste tires rules at 329 IAC 15-3-2 and 329 IAC 15-3-5 and the open dumping rules at 329 IAC 10-4-2 and 329 IAC 10-4-4(a).<sup>15</sup> Along with the NOV, IDEM enforcement Case Manager, Jodi Pisula, sent Respondents a Proposed Agreed Order which outlined the alleged violations and specified the actions needed to remedy those violations. None of the Respondents entered into the Agreed Order.<sup>16</sup>

10. On December 21, 2020, IDEM issued a Notice and Order of the Commissioner (CO),<sup>17</sup> and it was timely issued in accordance with Ind. Code § 13-30-3-4. The CO referenced the 2019 inspections as the basis for the enforcement action and cited the same violations as the NOV.<sup>18</sup> The CO requires all Respondents to cease and desist violating the waste tires rules at 329 IAC 15-3-2 and 15-3-5 and the open dumping rules at 329 IAC 10-4-2 and 10-4-4(a). Respondents were ordered to pay fifteen thousand dollars (\$15,000) in civil penalties.

11. On January 25, 2021, only Respondent Danita filed a timely Petition for Administrative Review (Petition). As to the remaining Respondents, James Gastineau, Jennie Redenbaugh, Leta Corbin, and Jena Jordan, the CO went into effect on January 25, 2021 pursuant to I.C. § 13-30-3-5. On February 16, 2021, attorney Samuel Drummy entered his appearance in this Cause on behalf of the Owners.

12. On February 9, 2022, Inspectors Hotz, Hayden Dayson, and Environmental Technical Specialist Anita Freeman conducted an inspection and a tire count. At the hearing, all three (3) individuals testified about this inspection,<sup>19</sup> but IDEM did not submit the Report into evidence.

13. The final hearing was held March 3, 2022. That same day, the ELJ issued an Order to Submit Proposed Findings of Fact and Conclusions of Law requiring that they be filed on or before April 18, 2022. IDEM filed its Proposed Findings of Fact and Conclusions of law on April 18, 2022. Respondent filed her Proposed Findings of Fact and Conclusions of Law via email on April 18, 2022 at 4:55 p.m. Pursuant to 315 IAC 1-3-3(d), documents filed after 4:30 p.m. are required to be file-marked as of the next business day; thus, the submission was file-marked for April 19, 2022. Respondent's Proposed Findings of Fact and Conclusions of Law was not timely filed.

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<sup>13</sup> Tr., p. 22.

<sup>14</sup> IDEM Ex. 6, Notice of Violation and Proposed Agreed Order, VFC No. 82986022.

<sup>15</sup> *Id.*

<sup>16</sup> Tr. pp. 38 - 39.

<sup>17</sup> IDEM Ex. 7, Commissioner's Order, VFC No. 83091140.

<sup>18</sup> *Id.*, pp. 2 - 3.

<sup>19</sup> Tr. pp. 23 - 25, 30 - 31, 34 - 35.

## CONCLUSIONS OF LAW

1. IDEM is authorized to implement and enforce Indiana environmental laws and rules promulgated relevant to those laws under I.C. § 13-13 *et seq.* OEA has jurisdiction over the decisions of the Commissioner of the IDEM and the parties to the controversy pursuant to I.C. § 4-21.5-7-3. In the exercise of its jurisdiction, OEA is governed by the Administrative Orders and Procedures Act (AOPA), I.C. § 4-21.5 *et seq.*, and OEA-specific rules, 315 IAC 1, *et seq.*

2. 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. The ELJ must apply a *de novo* standard of review when determining the facts at issue. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993). Findings of fact must be based exclusively on the evidence presented to the ELJ, and deference to the agency's initial factual determination is not allowed. *Id.*; I.C. § 4- 21.5-3-27(d). *De novo* review requires that the ELJ must determine all issues anew, based solely upon the evidence, and independent of any previous agency findings. *City of Indianapolis*, 2017 OEA 29. OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Env'tl. Adjud.*, 811 N.E.2d 806 (Ind. 2004).

4. Pursuant to I.C. § 13-30-3-9, the burden is on IDEM as the complainant to show the alleged violations.

5. Respondent James Gastineau owns an undivided one-third (1/3) interest, Respondent Jennie Redenbaugh owns an undivided one-third (1/3) interest, and Respondents Leta Corbin and Jena Jordan each own an undivided one-sixth (1/6) interest of the property located at 485 S 750 W, Lyons, Greene County, Indiana. In addition to Respondent Danita, these Owners were identified as Respondents in the CO IDEM issued on December 21, 2020.

6. Because the property Owners did not file Petitions for Administrative Review, the CO went into effect as to them on January 25, 2021 pursuant to I.C. § 13-30-3-5(a). The Owners are not parties to this Administrative Appeal.

### Waste Tire Storage Violation

7. The CO cited waste tire violations under 329 IAC 15-3-2 and 329 IAC 15-3-5. For 329 IAC 15-3-2, the question is whether the tires at the Site are used tires or waste tires.<sup>20</sup> Pursuant to 329 IAC 15-2-13, a "used tire" means a tire that meets *all* of the following criteria:

- (1) The tire is suitable for use on a motor vehicle as follows:
  - (A) The tire has at least two thirty-seconds (2/32) of an inch of remaining tread, or the tire wear bars are not exposed.

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<sup>20</sup> See 329 IAC 15.

- (B) The tire has no cuts, slashes, or exposed cord.
- (2) The tire is stored in a rack, stack, or row.
- (3) The tire is stored out of the weather to prevent accumulation of water or precipitation in the tires.

(Emphasis added). At the hearing, Inspector Hotz testified that at the October 17, 2019 inspection the tires had been cut, were stored on the ground and were not protected from accumulation of water or precipitation.<sup>21</sup> Further, in response to Respondent's cross-examination question about the distinction between a waste tire, a used tire, and a tire that could go back on a vehicle, Environmental Technical Specialist Freeman, explained,

No tires at that [Site] met the definition of a used tire. A used tire is required to be stored under cover or inside of a building, have 2/32 of a tread, and also be stored neatly in stacks, racks or rows. The definition of a waste tire is any tire not suitable for its intended purpose, so any tire that has been cut would be automatically a waste tire even if it was stored inside.<sup>22</sup>

Respondent presented no evidence that the tires at the Site meet the requirements of 329 IAC 15-2-13. Substantial evidence<sup>23</sup> supports IDEM's contention that the tires at the Site do not meet the requirements of 329 IAC 15-2-13(1), (2) or (3). By not qualifying as "used tires," the whole tires and cut tires on Site are considered "waste tires" which are defined as a tire not suitable for the tire's original purpose.<sup>24</sup>

8. Pursuant to I.C. § 13-11-2-251, a "waste tire storage site" means:

- (1) a site at which at least one thousand (1,000) passenger tire equivalents are accumulated outdoors or within a structure that is not completely enclosed; or
- (2) a site at which at least two thousand (2,000) passenger tire equivalents are accumulated indoors within a completely enclosed structure.

I.C. § 13-20-13-1(a) states that a "passenger tire equivalent" means a unit of waste tire material weighing twenty (20) pounds, whether the waste tire material is comprised of one (1) or more whole tires or one (1) or more altered tires. One tire can count as more than one PTE if the tire is larger than a standard passenger tire. The number of PTEs for an oversize tire, or pile of tire shreds, is determined by dividing its weight by twenty (20) pounds. *Id.*

8. If the number of tires on a site exceeds the specified number of PTEs under I.C. § 13-11-2-251, the site is considered a waste tire storage site. At the October 17, 2019, inspection, Inspector Woolsey performed an individual count of the tires at the Site. He counted 916 passenger tires (916 PTEs), 430 semi tires (2150 PTEs), and 14 agricultural tires (420 PTEs) for a

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<sup>21</sup> Tr. pp. 15 – 16.

<sup>22</sup> Tr. pp. 31 – 33.

<sup>23</sup> Tr. pp. 15 – 16, 21 – 22, 26, 32-33.

<sup>24</sup> See I.C. § 13-11-2-250; 329 IAC 15-2-13.2(a)

total of 1360 tires (3,486 PTEs).<sup>25</sup> The Site meets the definition of waste tire storage site under I.C. § 13-11-2-251.

9. 329 IAC 15-3-2(a) states:

The owner or operator of a waste tire storage site shall:

- (1) possess a valid certificate of registration issued under this rule; and
- (2) comply with all applicable requirements of this rule.

Because the Site meets the definition of waste tire storage site, Respondent was required to obtain a valid waste tire storage certificate of registration and comply with all applicable requirements of the waste tire rules, including storage requirements. Respondent did not. IDEM presented substantial evidence that conditions at the Site were in violation of 329 IAC 15-3-2.

#### Waste Tire Processing Violation

10. Pursuant to I.C. § 13-11-2-250.5, a “waste tire processing operation” means “an operation that processes waste tires by cutting, shredding, or grinding.” 329 IAC 15-3-5(a) states, “[t]he owner or operator of a waste tire processing operation shall (1) possess a valid certificate of registration issued under this rule; and (2) comply with all applicable requirements of this rule.”

At the hearing, photographic evidence and IDEM testimony<sup>26</sup> indicate tires at the Site have been cut or altered; thus, waste tire processing occurred at the Site. Pursuant to 329 IAC 15-3-5, Respondent was required to obtain a valid waste tire processing certificate of registration and to comply with all applicable requirements of the waste tire rules. Respondent did not. IDEM presented substantial evidence that conditions at the Site were in violation of 329 IAC 15-3-5.

#### Open Dumping Violations

11. The CO cited open dumping violations, which included both waste tires and miscellaneous solid waste.<sup>27</sup> I.C. § 13-11-2-205 defines “solid waste,” in part, as any “garbage, refuse, . . . or other discarded material.” 329 IAC 10-2-174 further defines “solid waste” to include specific types of waste examples of “other discarded materials,” including, but not limited to, “commercial waste,” “residential waste” and “household waste.”

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<sup>25</sup> IDEM Ex. 4, p. 3.

<sup>26</sup> Tr. pp. 22, 26, 31 - 33.

<sup>27</sup> IDEM Ex. 7, pp. 2 - 3.



329 IAC 10-4-2 states:

No person shall cause or allow the storage, containment, processing, or disposal of solid waste in a manner which creates a threat to human health or the environment, including the creating of a fire hazard, vector attraction, air or water pollution, or other contamination.

329 IAC 10-4-4(a) states:

The owner of real estate upon which an open dump is located is responsible for the following:

- (1) Correcting and controlling any nuisance conditions that occur as a result of the open dump. . . .
- (2) Eliminating any threat to human health or the environment.

I.C. § 13-11-2-146 defines “open dump” as follows:

“Open dump,” for purposes of environmental management laws, means the consolidation of solid waste from one (1) or more sources or the disposal of solid waste at a single disposal site that:

- (1) does not fulfill the requirements of a sanitary landfill or other land disposal method as prescribed by law or regulations; and
- (2) is established and maintained:
  - (A) without cover; and
  - (B) without regard to the possibilities of contamination of surface or subsurface water resources.

I.C. § 13-11-2-57(a) defines “disposal,” for purposes of environmental management laws, as the deposit. . .or placing of any solid waste. . .so that the solid waste. . .or any constituent of the waste, may enter the environment, be emitted into the air, or be discharged into any waters, including ground waters.”

12. VIs and Reports along with their attached photographs admitted into evidence indicate that during the 2019 inspections, IDEM reported finding miscellaneous solid waste:

- January 15, 2019 “Miscellaneous solid waste was also observed.”<sup>28</sup>
- April 5, 2019 “. . .waste tires spread out on the ground, anchored in with rip rap and miscellaneous solid waste.”<sup>29</sup>
- August 14, 2019 “Miscellaneous solid waste including household waste, a hot tub, mattresses, glass, metals, plastics and bags of waste were also observed.”<sup>30</sup>

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<sup>28</sup> IDEM Ex. 1, p. 3.

<sup>29</sup> IDEM Ex. 2, p. 3.

<sup>30</sup> IDEM Ex. 3, p. 3.

- October 30, 2019 “. . .waste tires and miscellaneous solid waste continue to remain on the property.”<sup>31</sup>

Respondent testified, but did not submit evidence showing, that she had uses for much of the miscellaneous solid waste, and some of the accumulated objects may have been usable for her intended purposes. To use miscellaneous solid waste to build her Earthship, Respondent would have had to apply for a legitimate use exception under 329 IAC 10-3-1(16), but she did not. Here, the placement of the solid waste does not comply with I.C. § 13-11-2-146 because it did not fulfill the requirements of a sanitary landfill or other land disposal method. Further, it was disposed without regard to the possibilities of contamination of surface or subsurface water sources, and “could attract mice, rats, or other animals.”<sup>32</sup>

With respect to the accumulation and improper storage of the waste tires, it too does not comply with I.C. § 13-11-2-146. Moreover, testimony was presented that there exists a threat to human health and the environment by creating a fire hazard, vector attraction, air or water pollution, or other contamination in violation of 329 IAC 10-4-2. IDEM presented substantial evidence that conditions at the Site were in violation of 329 IAC 15-3-5.

#### Application of the Civil Penalty Policy

13. I.C. § 13-30-4-1 authorizes IDEM to assess a penalty of \$25,000 per day per violation, and IDEM uses non-rule policy document “Civil Penalty Policy” (Policy)<sup>33</sup> to determine the amount of the penalty. The 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 facts and circumstances, and (3) considering the economic benefit of noncompliance.”<sup>34</sup> The base penalty may be adjusted upward or downward to reflect circumstances surrounding the violation by considering the adjustment factors:

- Actions before the violation
- Actions after the violation
- History of noncompliance
- Ability to pay
- IDEM enforcement costs
- Other unique factors.<sup>35</sup>

14. The Civil Penalty Matrix evaluates the relationship between potential for harm and extent of deviation from a requirement.<sup>36</sup> Potential for harm is determined by (1) the likelihood

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<sup>31</sup> IDEM Ex. 4, p. 3.

<sup>32</sup> T.R., p. 50.

<sup>33</sup> IDEM’s Ex. 9 NPD Civil Penalty Policy, p. 1. The policy can be found in 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.

<sup>34</sup> *Id.* at 2. Civil Penalty = Base Penalty +/- Adjustment Factors + Economic Benefit.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

and degree of exposure of persons or the environment to pollution; or (2) the degree of adverse effect of noncompliance on statutory or regulatory purposes or procedures for implementing the program.<sup>37</sup> Enforcement staff are to consider the following in determining the potential for harm:

- Amount of pollutant
- Toxicity of pollutant
- Sensitivity of the environment
- Sensitivity of the human population
- Length of time of exposure
- Size of the violator.”<sup>38</sup>

### *Waste Tire Violations*

15. As to the waste tire violations Case Manager Pisula testified she calculated a Moderate potential for harm and Moderate extent of deviation.<sup>39</sup> Under the Policy, a Moderate potential for harm is defined as “(1) [t]he violation poses a significant likelihood of exposure or degree of exposure to pollution; and/or (2) [t]he actions have or may have a significant adverse effect on the statutory or regulatory purposes or procedures for implementing the program.”<sup>40</sup>

16. Case Manager Pisula testified she calculated the potential for harm as Moderate because

Water was observed inside the tires on Site which were uncovered, stored outside, which is an attractant for mosquitoes and breeding. Also, if they would happen to catch fire, chemicals could be released into the air, water, and soil which would contribute to contamination.<sup>41</sup>

When asked, “does that [Site] present a harm to the waste tire program,” she testified, “It allows and encourages others to not follow established rules, regulations, regarding proper storage and disposal of waste tires.”<sup>42</sup> Without specificity, there is no showing of “a significant adverse effect. . .for implementing the program.” Further, although her testimony arguably could be considered to have addressed two (2) of the six (6) potential for harm factors, “amount of pollutant” and “sensitivity of the environment,” Case Manager Pisula provided no testimony regarding the other four (4): toxicity of the waste tires, sensitivity of the human population, length of time of exposure or size of the violator although required to consider them in her determination.<sup>43</sup>

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*, p. 5.

<sup>39</sup> IDEM Ex. 8, Penalty Worksheets.

<sup>40</sup> IDEM Ex. 9, p. 3.

<sup>41</sup> Tr., p. 45.

<sup>42</sup> *Id.*, p. 46.

<sup>43</sup> IDEM Ex. 9, p. 3.

17. The January 15, 2019 Report stated, “The 1/4/19 inspection found approximately 600 – 700 tires on Site.<sup>44</sup>” The April 5, 2019 Report contained no estimate. Referencing the January 4, 2019 and April 2, 2019 inspections of 600 – 700 tires on Site,<sup>45</sup> Inspector Driskill reported that at the May 29, 2019 inspection,

IDEM staff counted over 1000 tires in the two areas of the property. IDEM staff estimated that approximately 10% of the tires were passenger tires. The remaining tires appeared to be “semi” truck tires. IDEM has published conversion charts in the Waste Tire Storage Site Registration application. . . . IDEM staff used the conversion chart in the . . . application to estimate the number of tires on Site to be greater than 5000 PTEs.<sup>46</sup>

Inspectors participating in the May 29, 2019 inspection, Inspector Driskill, Solid Waste Compliance Section Chief Kelly B. Hall, or Senior Environmental Manager, Industrial Waste Compliance Section Tracy Barnes did not testify. The Report for this inspection did not indicate that the tires were individually counted, and no chart showing the conversion of the tires to PTEs was included.

During the October 17, 2019 inspection, Inspectors Hotz and Woosley accompanied Inspector Driskill. In the October 30, 2019 Referral, Inspector Driskill reported,

Tires remaining on Site are passenger tires and “semi” truck tires. Cut up tires were also on Site. There are 3,486 PTE tires in the two areas of the property. . . .Inspector Woosley individually counted the tires and found the below listed violations. No effort towards compliance was observed.<sup>47</sup>

(Emphasis original). Inspectors Driskill and Woosley did not testify. Inspector Hotz testified that the October 2019 inspection was the first time he visited the Site, and that he assisted Inspector Woosley in the count, but was not personally “keeping track of it.”<sup>48</sup> Because the reported number of PTEs at the May 29, 2019 inspection (greater than 5000) was reduced to 3,486 in the October 17, 2019, Inspector Driskill’s conclusion that “No effort towards compliance was observed” is not supported by the evidence. For these reasons, the potential for harm is Minor.<sup>49</sup>

18. Case Manager Pisula testified that she chose Moderate extent of deviation based on the number of tires or PTEs counted at the Site estimated at 3,486 and that the tires were not being managed properly under the rules.<sup>50</sup> Moderate extent of deviation is defined as “[t]he violator

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<sup>44</sup> IDEM Ex. 1, p. 3.

<sup>45</sup> These inspections were reported in the January 15 and April 5, 2019 Reports.

<sup>46</sup> IDEM Ex. 3, p. 3.

<sup>47</sup> IDEM Ex. 4, p. 3.

<sup>48</sup> Tr., p. 17.

<sup>49</sup> In the Policy, Minor potential for harm is defined as “(1) The violation poses a relatively low likelihood of exposure or degree of exposure to pollution; and/or (2) The actions have or may have an adverse effect on the statutory or regulatory purposes or procedures for implementing the program.”

<sup>50</sup> Tr., p. 47.

significantly deviates from the requirements of the regulation, permit, or statute or only some of the requirements are implemented.”<sup>51</sup> For the waste tire violations Respondents were assessed eight thousand, seven hundred and fifty dollars (\$8,750.00).<sup>52</sup> Case Manager Pisula testified why she chose \$8,750.00:

Generally, we start in the middle to allow movement up or down within the cell matrix. Moderate was chosen due to the number of tires based off of the PTE estimate, and it is based also on previous cases which are with large numbers of tires being stored on site uncovered.<sup>53</sup>

The Policy does not instruct enforcement staff to start in the middle of the Civil Penalty Matrix in determining the base penalty. IDEM did not proffer exhibits, citations to previous cases, or a point of reference as to what constitutes “large numbers” to justify choosing the middle of the range. None of the IDEM witnesses provided an explanation as to why the number 3,486 constitutes a “large number.” Further, it is unclear how the 600 – 700 tires that IDEM staff counted at the January 4, 2019 inspection, which staff estimated at “greater than 5000 PTEs,” and the subsequent count on October 17, 2019 that staff estimated at 3,486 PTEs reflects “No effort towards compliance was observed.” For these reasons, the extent of deviation is Minor.

IDEM did not present substantial evidence that the waste tire violations were Moderate/Moderate. Based on a finding of Minor/Minor for these violations which range from one thousand dollars (\$1,000.00) to two thousand dollars (\$2,000.00), the base penalty for the waste tire violations is assessed at one thousand dollars (\$1,000.00).

### *Open Dumping Violations*

19. For the open dumping violations, Respondents were assessed six thousand, two hundred and fifty dollars (\$6,250.00). Case Manager Pisula assessed Moderate potential for harm and Minor extent of deviation. The range of potential penalties for Moderate/Minor is five thousand dollars (\$5,000.00) to seven thousand, five hundred dollars (\$7,500.00). Case Manager Pisula assessed Moderate potential for harm and testified,

Moderate was chosen due to the number of tires stored onsite outside uncovered with no registration to the storage facility. They were observed to be holding standing water, some were submerged in a pond. There was also a significant likelihood for mosquito breeding to occur as well as a possible tire fire. There was also miscellaneous solid waste throughout the property which could attract mice, rats or other animals.<sup>54</sup>

She did not proffer testimony explaining why she chose the middle of the range for these violations.

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<sup>51</sup> IDEM Ex. 8, p. 3.

<sup>52</sup> The civil penalty matrix proffers a range for Moderate/Moderate from \$7,500.00 to \$10,000.00.

<sup>53</sup> Tr. p. 48.

<sup>54</sup> Tr. p. 50.

20. As to the assessment for the tires' potential for harm, Case Manager Pisula provided no testimony regarding the potential for harm factors including toxicity of the waste tires, sensitivity of the human population, length of time of exposure or size of the violator although required to consider them in her determination. As to the miscellaneous solid waste, she provided no testimony regarding any of the potential for harm factors. For these reasons, the potential for harm is Minor.

21. Case Manager Pisula assessed Minor extent of deviation because

“[t]here are four (4) persons that share the ownership of the property. One was aware and consented to the open dumping. The others were not aware and did not consent. And also Ms. Gastineau<sup>55</sup> or a relative of hers had made an effort to try and remove most of the solid waste that was on [the] Site.”<sup>56</sup>

Case Manager Pisula proffered no testimony as to the adjustment factor, Actions After the Violation, which could have reduced the dollar amount from her assessment. IDEM did not present substantial evidence that the open dumping violations were Moderate/Minor. In the Policy's Matrix, Minor/Minor penalties range from one thousand dollars (\$1,000) to two thousand dollars (\$2,000).<sup>57</sup> The base penalty for the open dumping violations is one thousand dollars (\$1,000.00).

22. IDEM met its burden showing the violations contained in the December 21, 2020 CO are based on substantial evidence. The total civil penalty is two thousand dollars (\$2,000.00).

#### Issues raised in Respondent's Petition for Administrative Review<sup>58</sup>

This Case required IDEM to prove its Commissioner's Order was supported by substantial evidence. Many of the issues Respondent raised in her Petition for Administrative Review are not tangentially related to whether IDEM's Order was supported by substantial evidence. Notwithstanding, in the interest of responding to Respondent's concerns, the Counts contained in her Petition are discussed below.

23. In Count 1 of her Petition, Respondent objects to the lack of notice and participation of IDEM inspections.<sup>59</sup> At the time of the first inspection on January 15, 2019, IDEM believed the property still belonged to a prior owner and did not know Respondent was responsible for the waste tires and miscellaneous solid waste.<sup>60</sup> Prior to the May 29, 2019 inspection, Respondent

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<sup>55</sup> Gastineau was Respondent's given name.

<sup>56</sup> Tr. p. 50.

<sup>57</sup> Policy, p. 4.

<sup>58</sup> Respondent raises concerns about the validity of the violations of 329 IAC 10-4-2 and 329 IAC 10-4-4; these concerns are addressed previously in this Order.

<sup>59</sup> Petition, p. 11.

<sup>60</sup> IDEM Ex. 1, p. 2

was contacted by email about the inspection, but she did not respond or appear.<sup>61</sup> Although I.C. § 13-14-2-2 does not require advance notice of inspections or another party's participation in the inspection, IDEM Inspectors left a business card and attempted to locate her at the property<sup>62</sup> to no avail. Respondent was present at the October 17, 2019 inspection.<sup>63</sup>

24. In Counts 2 and 3, Respondent contends that IDEM does not "have jurisdiction to supersede Indiana Home Rule for building codes."<sup>64</sup> The Indiana General Assembly established IDEM under I.C. § 13-13-1 on July 1, 1986. IDEM is the designated environmental agency for all purposes under the federal Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*<sup>65</sup> and as such, is the agency in the State of Indiana that has jurisdiction over the Site.

Building codes at the state level are not statutes under the Indiana Code but administrative rules governed by the Indiana Fire Prevention and Building Safety Commission under title 675 of the Indiana Administrative Code. While it is true that under the Home Rule Act, governmental units can adopt their own building codes, neither the Greene County Health Inspector nor DNR have any authority over violations under 329 IAC within the State. Even assuming Respondent was in compliance with applicable Greene County building code requirements, she was also required to comply with applicable state requirements under 329 IAC.

25. In Counts 4 and 6, Respondent contends she is not "a tire storage business [or] commercial operation."<sup>66</sup> There exists no requirement in applicable statute or rule that one must be a "business" in order to be subject to waste tire regulations. See I.C. § 13-11-2-250.5 (a waste tire operation means an operation that processes waste tires by cutting, shredding, or grinding"); *see also*, 329 IAC 10-4-2 and 10-4-4(a). Under I.C. § 13-11-2-251, a waste tire storage site is determined by the number of PTEs, and the number of PTEs at the Site exceeded 1,000 PTEs.

26. In Count 5, Respondent contends "[t]he number of tires is grossly overstated and miscalculated."<sup>67</sup> Inspector Hotz testified under oath that the tires were individually counted at the October 17, 2019 inspection, and their count exceeded 1,000 tires at the Site;<sup>68</sup> thus, waste tire storage requirements are applicable. Respondent proffered no testimony or provided exhibits explaining how the count was miscalculated or grossly overstated at the Site; thus, her claim is without merit.

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<sup>61</sup> IDEM Ex. 3, p. 3

<sup>62</sup> *Id.*

<sup>63</sup> IDEM Ex. 4, p. 3.

<sup>64</sup> Petition, p. 11.

<sup>65</sup> I.C. § 13-13-5-1(2).

<sup>66</sup> Petition, p. 12.

<sup>67</sup> *Id.*

<sup>68</sup> IDEM Ex. 4, p. 3.

27. In Count 7, Respondent claims that IDEM Inspectors and the Department of Natural Resources (DNR) Conservation Officer (DNRCO) engaged in misconduct<sup>69</sup> including

- she was misidentified as her grandmother;
- she was threatened with arrest;
- IDEM trespassed the Site;
- IDEM failed to check plat maps; and
- Both IDEM and DNR left her out of the inspections.<sup>70</sup>

It is unclear why Respondent's alleged misidentification as her grandmother, if true, is relevant to this Cause. As to being threatened with arrest, Respondent attempted to refuse IDEM Inspectors access to the Site at the October 17, 2019 inspection. DNRCO Swanson explained to her why IDEM had legal access and presented her with the "Inspection Information" authorization as prescribed by I.C. § 13-14-2-2. DNRCO Swanson informed her the IDEM inspectors would be accessing the property to conduct the inspection and any physical obstruction would result in Respondent's arrest. In Indiana, a DNRCO has the authority and power to arrest a person for a violation of natural resource laws when committed in the officer's presence.<sup>71</sup>

As to the alleged trespass, Respondent has no ownership interest in the property to claim trespass. IDEM inspectors have statutory authority to enter upon private or public property to inspect for and investigate possible violations of environmental management laws.<sup>72</sup> For the October 17, 2019 inspection, permission to access the property was granted by Karen Redenbaugh, legal guardian for Jennie Redenbaugh, one of the Owners of the Site.<sup>73</sup>

Respondent did not proffer testimony or submit evidence supporting her allegations of misconduct by IDEM or DNR. IDEM was legally on the Site to conduct an inspection and is not required to check plat maps to do so.

28. In Count 8, Respondent cites the definition of "legitimate use" and claims that "[n]o where in that statute and definition does it give IDEM sole and absolute rights, powers to deny or approve use of upcycled anything."<sup>74</sup> The legitimate use of a solid waste requires specific approval by IDEM's Commissioner.<sup>75</sup> Although IDEM had conversations and counsel for IDEM

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<sup>69</sup> Petition, p. 13.

<sup>70</sup> This allegation was addressed under Count 1, *supra*.

<sup>71</sup> I.C. § 14-9-8-16(a).

<sup>72</sup> I.C. § 13-14-2-2.

<sup>73</sup> IDEM Ex. 4, p. 3.

<sup>74</sup> Petition, p. 13.

<sup>75</sup> 329 IAC 10-3-1(16).



sent Respondent a detailed email explaining the legitimate use application process,<sup>76</sup> Respondent did not apply for legitimate use approval. With respect to IDEM's rights or powers, IDEM is the state's designated environmental agency and thus has jurisdiction over the approval or denial of the legitimate use of recycled materials.<sup>77</sup>

29. In Count 9, Respondent contends that her extended family was "named in this order. . . for me to be solely punished and not for them to face any fines or culpability."<sup>78</sup> Respondent's family members who have ownership interest in the property were included in the enforcement action due to the responsibility they have with respect to the open dumping under 329 IAC 10-4-4. None of the other family members appealed the Commissioner's Order and thus, it became effective as to the Owners on January 25, 2021. Respondent's claim that the CO was issued to solely punish her is without merit.

30. In Count 10, Respondent references LSA Document #17-279.<sup>79</sup> The document<sup>80</sup> is a proposed rule revision, subject to presentation to and approval of the Environmental Rules Board before it becomes effective. The existence of this proposed rule is irrelevant due to its not having been promulgated as of the dates of the violations at issue. Moreover, the proposed revision does not significantly change the rules cited within the Commissioner's Order. This revision does, however, provide specific new provisions related to the legitimate use of waste tires, creating new "rule-based" legitimate uses, while still preserving the previous requirement of IDEM Commissioner approval for those uses not specifically approved by rule.<sup>81</sup> Under this revision, the use of waste tires as a construction material would still require specific approval from IDEM's Commissioner.

#### **FINAL ORDER**

**IT IS THEREFORE ORDERED** that Respondent violated I.C. § 13-30-2-1(1), I.C. § 13-30-2-1(3), 329 IAC 15-3-2, 329 IAC 15-3-5, 329 IAC 10-4-2 and 329 IAC 10-4-4(a). Respondent is subject to civil penalties of two thousand dollars (\$2,000.00) for violating Indiana's environmental management laws. Effective immediately, Respondent shall comply with the statutes and rules listed above.

Within thirty (30) days of the date of this opinion, Respondent shall remove any remaining miscellaneous solid waste, including, but not limited to, household waste, a hot tub, mattresses, mattress springs, glass, metals, and plastic bags from the Site. Within sixty (60) days, Respondent shall remove all waste tires, whole and cut from the Site. Following the

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<sup>76</sup> Tr. p. 51.

<sup>77</sup> I.C. § 13-13-5-1.

<sup>78</sup> Petition, p. 14.

<sup>79</sup> *Id.*

<sup>80</sup> See Proposed Waste Tire Rule Revisions, LSA Document 17-289, <http://iac.iga.in.gov/iac//20191204-IR-329170279PRA.xml.html>.

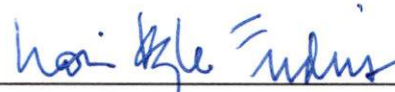
<sup>81</sup> *Id.*

removal of the miscellaneous solid waste and the waste tires, Respondent shall submit photographic and written documentation including a disposal manifest showing all waste has been removed and properly disposed of at a permitted solid waste management facility.

IDEM's December 21, 2020 Commissioner's Order is **AFFIRMED** in all other respects.

You are further notified that pursuant to provisions of I.C. § 4-21.5-7-5, OEA serves as the ultimate authority in administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is a Final Order subject to Judicial Review consistent with applicable provisions of I.C. § 4-21.5. Pursuant to I.C. § 4-21.5-5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

**IT IS SO ORDERED** this 24th day of May, 2022, in Indianapolis, IN.



Hon. Lori Kyle Endris  
Environmental Law Judge  
[frontdesk@oea.IN.gov](mailto:frontdesk@oea.IN.gov)

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