

06.30.23



# INDIANA OFFICE OF ENVIRONMENTAL ADJUDICATION

Mary L. Davidsen, *Chief Environmental Law Judge*  
Lori Kyle Endris, *Environmental Law Judge*  
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STATE OF INDIANA )  
)  
COUNTY OF MARION )  
)  
IN THE MATTER OF: )

BEFORE THE INDIANA OFFICE OF  
ENVIRONMENTAL ADJUDICATION

CAUSE NO. 18-W-E-5028

COMMISSIONER, INDIANA DEPARTMENT OF  
ENVIRONMENTAL MANAGEMENT,

Case No. 2013-22079-Q

Complainant,

v.

LARRY & CAROL YELEY  
FAMILY LIMITED PARTNERSHIP,  
YORKTOWN, DELAWARE COUNTY, INDIANA,  
Respondent.

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

This matter came before the Office of Environmental Adjudication (“OEA” or “Court”), by legal counsel, on the May 11, 2022 Final Hearing on Respondent’s Larry & Carol Yeley Family Limited Partnership’s October 1, 2018 Petition for Administrative Review and Adjudicatory Hearing on the issuance of a September 14, 2018 Notice and Order of the Commissioner of the Indiana Department of Environmental Management. In sum, the Indiana Department of Environmental Management alleged unpermitted regulated wetland clearing, deposits and agricultural activity on a farm near Yorktown, Delaware County, Indiana.

The Chief Environmental Law Judge (“ELJ”), having considered the Petition, record of the proceedings, and prior filings, now finds that judgment may be made upon the record and testimony as to whether the Indiana Department of Environmental Management properly issued the Notice and Order of the Commissioner of the Indiana Department of Environmental Management to Larry & Carol Yeley Family Limited Partnership. The ELJ, by substantial evidence, and being duly advised, now makes the following findings of fact and conclusions of law, and enters the following order as to the existence and extent of wetlands subject to IDEM regulation since May, 2011:

### FINDINGS OF FACT

1. At issue is whether an alleged wetland is subject to enforcement for unpermitted regulated wetland clearing, deposits and agricultural activity since May, 2011, on 11.82-acres of

155.32-acre Farm #6190, Tract #578, located at S CR 600W, in Yorktown, Delaware County, Indiana ("Site"). The Larry & Carol Yeley Family Limited Partnership ("Yeley") owns an undivided half interest in the Site. (*Stipulations* ("*Stip.*"), ¶ 1.) The Site includes a 1.6-acre shallow pond, referred to by the parties as a "water feature"; its fringe has never been farmed. *Stip.* ¶ 3.

2. On January 7, 2008, the Natural Resources Conservation Services ("NRCS") District Conservationist notified Larry Yeley via letter that a preliminary technical determination (for agricultural land use concerning the amended 1985 Food Security Act conservation provisions, not for Army Corps of Engineers Clean Water Act jurisdiction) identifying wetlands on a 14.2-acre and a 1.6-acre field. *Tr. Ex. S-8*.<sup>1</sup> The determination was made for Farm #6190 Tract #578 on the property located at S CR 600W, in Yorktown, Delaware County, Indiana ("Site"). *Id.*

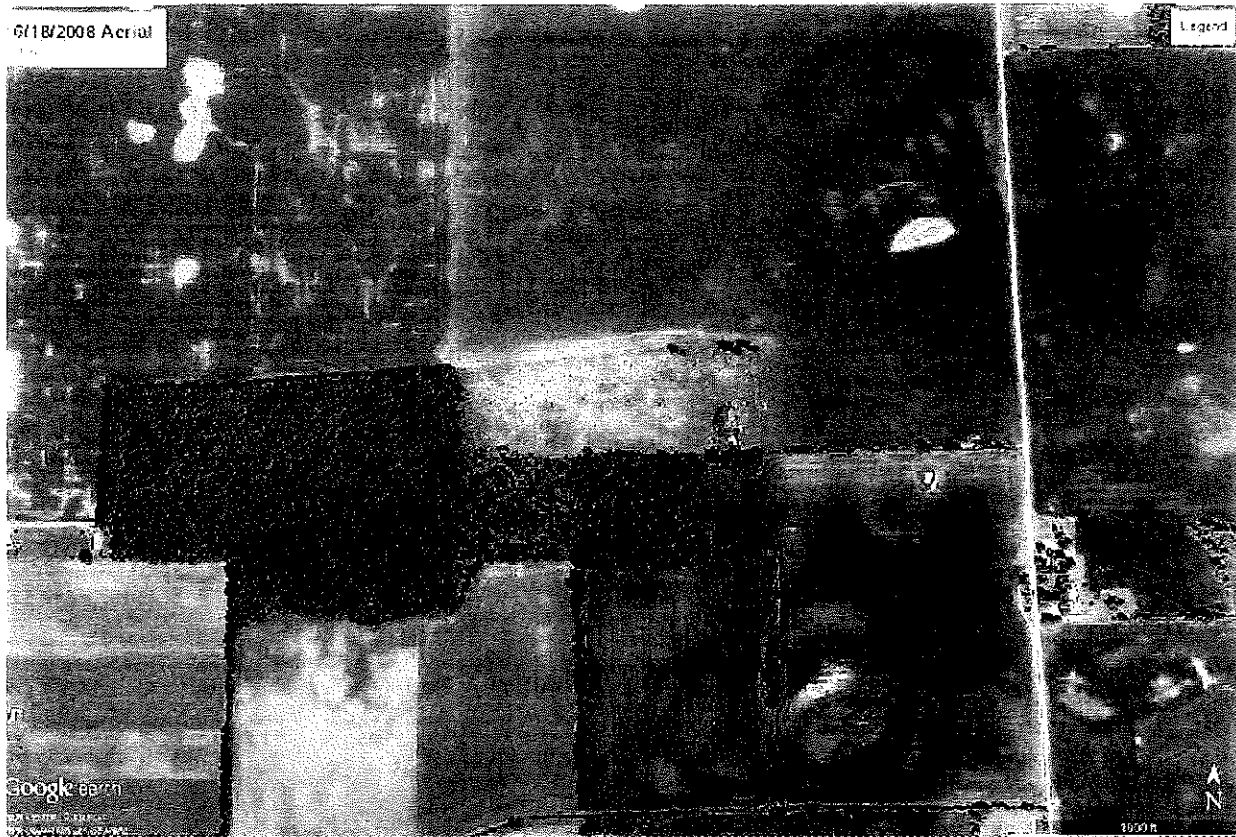
- a. The 14.2-acre field was coded "WX", for "A wetland area that has been manipulated after December 23, 1985, but was not, for the purpose of making production possible and production was not made possible. These include wetlands manipulated by drainage maintenance agreements." *Id.*
- b. The 1.6-acre field was coded "CW+yr 2007", for "An area converted after November 28, 1990." *Id.*

3. Indiana Department of Environmental Management ("IDEM") staff visited the Site four times between 2008 and 2013. In 2008 and 2010, IDEM walked portions of the Site. In 2009 and 2013, IDEM viewed the Site from the road. In addition to a half-page of field notes taken during the 2008 visit, *Tr. Ex. 12*, and photographs and documents admitted at the Final Hearing, IDEM's witnesses' testimony was based on their recollection of visits nine to fourteen years earlier. *See Hr'g Tr.* 99:11-13.

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<sup>1</sup> Hearing exhibits were specifically marked at Trial Exhibits, *Cf. The Bluebook: A Uniform System of Citation*, B17 et al at 25, 26 (Columbia L.Rev.Ass'n et al. eds., 21<sup>st</sup> ed. 2020). For clarity, this Order will cite the term "Trial" as specifically stated on each document. The designation S- preceding an exhibit number indicates that the parties stipulated to the exhibit.

4. An aerial Site views shows the Site post-disturbance to the wooded area. *Tr. Ex. S-3, p. 4.*



5. IDEM investigates potential wetlands by conducting a wetland determination, a technical assessment of an area to determine whether it contains the three wetland criteria: the dominance of hydrophytic vegetation, hydric soils, and hydrology. *Hr'g Tr.*, p. 94:13-95:52, 95:3-6: *see* 170:17-23.

6. IDEM's determination becomes "part of a larger record, called a wetland delineation, which determines the extent of the wetland and its boundaries." *Id.* IDEM requires the delineation to be conducted by the landowner. In post-hearing briefing, Respondent Yeley challenged IDEM's requirement that the landowner/regulated community conduct the wetlands delineation, as an impermissible, unpromulgated rule.

7. IDEM asserted that it applies the 1987 Army Corps of Engineers Delineation Manual ("Manual") or the 2010 Midwest Regional Supplement to the 1987 Manual's instructions ("Manual Supplement"). *Id.* at p. 82:4-7, 95:7-11. The 1987 Manual and 2010 Manual Supplement describe how to take a data point and evaluate the presence of the three wetland criteria at that data point. *Id.* at 95:16-21.

8. To conduct a wetland determination per policy stated in the Manual and Manual Supplement, IDEM digs a soil pit. *Id.*, at 171:1-2. For almost twenty years, IDEM's standard practice and policy has then been to document its observations on a United States Army Corps

of Engineers (“USACE”) Wetlands Delineation Data Sheet (as provided in the Manual or Manual Supplement) where IDEM looks at “the soils, the vegetation and the hydrology indicators.” *Id.* at 95:22-96:12, 97:5-11, 170:17-23, 172:9-15. The data sheet acts as a checklist for what information to gather. *Id.* at p. 65:20-66:3. IDEM testified that it follows the same determination process for disturbed or atypical sites. *Id.* at 97:5-11.

9. IDEM’s “policy that if [it] take[s] a wetland data point and it confirms the presence of a wetland at that data point, [IDEM has] a wetland for purposes of the regulatory program.” *Id.* at 80:1-8. Once IDEM has delineated a wetland, the property owner is then to prove that the entire parcel (regardless of size) is not a wetland or delineate the extent of any wetland that may exist. *Id.* at 38:6-12. The landowner’s private-sector consultants complete the wetland delineation. *Id.*, 80:9-11. IDEM “do[es] not do wetland delineations,” *Id.*, 79:23, because “[it] doesn’t have the resources,” *Id.*, 80:1-3, and that conducting a wetland delineation “would be an extensive expense. Time wise, [IDEM] do[esn’t] have the staff to complete routine delineations for people, and that is where the onus goes on the landowner.” *Id.*, 190:7-18.

10. IDEM extrapolates site wetland data from one data point for results across parcel, instead of evaluating site transects, *Id.*, 174:13-20, or regardless of whether a Site was disturbed. If the data point meets all three criteria, that is “sufficient for IDEM to require [a] full delineation.” *Id.*, 176:22-177:2.

11. At the April 28, 2009 Site inspection, IDEM learned about the 2007 Clearing and observed the Site had been mechanically cleared of stumps, trees, shrubs, and herbaceous vegetation. *Stips ¶¶ 4-6; Tr. Ex. S-7; Hr’g Tr.* 79:3-13. During the inspection, IDEM staff observed that the Site had been cleared to convert it to agricultural use. *Hr’g Tr., Id.* Clearing activity including mechanical clearing of tree stumps. *Id.* IDEM stated that the clearing took place on a state regulated forested wetland, without an IDEM permit. *Id.; Hr’g Tr.*, p. 14:15-19. Although IDEM Site inspection staff were not wetland scientists or botanists, and did not hold any certifications for delineating wetlands, they did not make observations requiring such credential, in addition to their training. *Id.*, 60:21-23, 93:4-10, 127:20-128:). Except for a half-page of field notes taken during the 2008 visit, *Tr. Ex. 12*, IDEM’s witnesses’ testimony was based solely on their recollection of visits nine to fourteen years earlier. *Hr’g Tr.* p. 99:11-13. IDEM did not verify any wetland boundaries, *Id.*, 221:18-222-4, nor did it complete any USACE Data Forms. *Tr.* 65:5-13, 94:8-12, 177:9-14.

12. IDEM testified that during the Yeley Site inspection, it conducted a wetland determination, not a wetland delineation. *Hr’g Tr.* 73:20-74:6. As part of the wetland determination, IDEM testified it dug a single soil pit. *Id.*, 20:1-2. IDEM did not recall the precise location where it dug the pit, instead testifying that it “would have been around, . . . the B6 area . . . It’s kind of the west side of the Site—is the best of my memory.” *Id.*, 61:23-62:1. IDEM testified that the soil was moist, but could not recall whether the pit filled with water at the depth of 16 inches. *Id.*, 64:1-12. Prior to conducting the inspection, IDEM did not verify the depth of the water table, and did not know the depth to groundwater. *Id.* at 67:21–68:1. IDEM also observed standing water, which it “would imagine” was “from rainfall.” *Id.*, 64:21-23. The weather during the inspection was overcast and “it may have been sprinkling.” *Id.*, *Tr.* 64:18-

19. It is common to have standing water on top of the soil from rainfall in March and April because of the lower temperatures. *Id.*, 267:5-11. The rain and water “will sit there,” and “won’t evaporate until it gets warmer . . . but then you dig your pit and you won’t have saturation below.” *Id.*, 267:5-11. No drainage tiles or other means for removing water were found at the Site. *Id.*, 101:12-15.

13. IDEM also observed several types of vegetation at the disturbed Site, including Wild Geranium, Spring Beauty, Garlic Mustard, Bedstraw, Hackberry, Spice Bush, and Dogwood. *Tr. Ex. 12.* IDEM did not document the coverage percentage of each vegetation type, *Id.*, 66:4-7, or whether a particular vegetation type was a dominant species. *Id.*, 66:8-11. Nor did IDEM calculate the number of dominant species which are obligate wetlands plants. *Id.*, 66:12-19. In 2018, Respondent Yeley engaged wetlands consultant, Cardno Practice Lead Marc Woernle. *Tr. Ex. C.* Mr. Woernle stated that several of these species of vegetation were non-wetland species or were unlikely to be found in a wetland.

14. As for soil types, IDEM recalled that the soil maps suggested there were “multiple types of soils mapped.” *Id.*, 67:11-20. IDEM’s field notes from the inspection state the soil color was a “3/1.” *Id.*, *Tr.* 67:6-9. Respondent challenged that a “3/1, in and of itself, does not determine a hydric soil.” *Id.*, 267:2-3. That finding is “insufficient to . . . determine if that’s a wetland soil without something else,” including “either a depleted matrix below it or there needs to be a qualifier that that’s mucky soil.” *Id.*, 266:19-267:1.

15. IDEM identified the general but not the exact location of the fourteen Site photographs it took. *Tr. Ex. 9*, p. 3-14.

16. IDEM did not use or complete a Wetlands Delineation Data Sheet to document its Site observations. *Id.*, 60:20-21.

17. As found in the Court’s May 13, 2020 Findings of Fact, Conclusions of Law and Non-Final Order on Summary Judgment (“Summary Judgment Order”), p. 5, ¶ 13:

“The parties do not dispute that the 15.8 acre Site includes 11.82 acres of formerly forested land, with the remaining approximately 3.98 acres covered by water (the parties refer to the water-covered area as the “Water Feature”). Larry Yeley averred that the “Site used to be covered in trees, except for on the Southeastern portion of the Site, where there is still a small, shallow pond (“Water Feature”). “Sometime between October 2007 and December 2007, I used a bulldozer to clear approximately 11.82 acres of the Site so that the Site could be used for planting crops”<sup>2</sup> and continued to do so, until he received a “Stop Work” notice from Toni Cecil at the Muncie Sanitary District. “Sometime shortly thereafter (during 2008), I cleared the remaining remnants and burned or buried the remaining stumps.” “Since the initial clearing in 2007, neither I nor the Land Partnership nor the Land Partnership 2 have cleared, filled, or otherwise impaired the Water Feature.” Although cleared of trees, the Site was not cultivated for crops through August, 2010. Crop cultivation commenced at some time after August

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<sup>2</sup> *Id.*, ¶ 4.

2010 and by the 2012 soybean growing season, as observed on February 11, 2013.” (internal cites omitted).

18. On August 5, 2008, Yeley consultant JFNew issued Wetland Delineation Report Yeley Property Delaware County, Indiana (“Delineation”) regarding field investigations done on July 16, 17, and 24, 2008. *Tr. Ex. 6* (some pages marked “DRAFT”). The Delineation concluded that there were approximately 11.82 acres of forested wetland prior to the “disturbance at the site”. *Id.*, p. 3. The Delineation was submitted to IDEM by Ms. Yeley. *Hr’g Tr.* at 39:7-12.

19. JFNew Delineation’s field inspection team was John Richardson, a senior wetland delineator with JFNew, Bruce Behan, a botanist with JFNew, and Respondent’s consultant Huge Brown, a certified professional soil scientist with Professional Soil Consulting, LLC. *Tr. Ex. 6*, p. 2. Both parties’ witnesses described Richardson to be very good or “one of the best in the state.” *Tr. Ex. 6*, p. 2, 3; *Hr’g Tr.*, p. 133:8-11, 279:2. JFNew applied the three criteria required by the USACE; the three criteria, in sum, are hydrophytic vegetation, hydric soils and hydrology) to conclude that the Site area identified by IDEM in 2008 contained “approximately 11.82 acres of forested or formerly forested wetlands . . . located in the cleared forested area on the Yeley property prior to the disturbance at the site”. *Tr. Ex. 6* at 2, 3. The Delineation team observed hydrophytic vegetation and solids. *Id.* For wetland hydrology, three points were identified where the soil was saturated within a major portion of the root zone (usually twelve inches of the surface) three datapoints showed wetland hydrology under normal circumstances, all in the water feature area. *Id.* Otherwise, the Site’s hydrology “was variable and had to be inferred from hydric soils at the Site and secondary indicators, due to the (dry) season in which the Site investigation was conducted. *Id.* The consultant noted water standing in holes where trees had been removed. *Id.*

20. On August 19, 2010, Mr. Yeley was present during a Site Inspection conducted by USACE project manager Sarah Keller and IDEM’s Brad Baldwin. *Tr. Ex. 5-5; see also Tr. Ex. 10.* USACE Project Manager Sarah McKeown/Keller concluded that the Site clearing activity did not impact waters of the United States, but urged Yeley to contact IDEM “for the applicability of state law of the reported wetland.” *Id.* In a Finding of Fact, Summary Judgment Order, p. 6, ¶ 17 (designated as evidence by both parties), the Court found:

“August 19, 2010 USACE Site Inspection by Project Manager Sarah Keller (“Keller Report”)<sup>3</sup> (subject to objection from Respondent) contained Keller’s observations of potential wetland Site characteristics, based on after-the-fact descriptions of photos taken near the Water Feature during her Site visit. Keller stated, “No work has occurred on the property since 2008.” Keller did not dig soil pits to determine whether the soil was hydric, nor include the minimum number of transect samples to be taken at a Site to ensure that the samples are representative of overall Site conditions. Keller did not state a conclusion as to Site hydrology in areas outside of the Water Feature. The Keller Report did not state the percentage of facultative plants she observed along the fringe of the Water Feature. The Keller Report did not result in USACE’s issuance of an

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<sup>3</sup> Response, p. 2, 3.; Ex. 3, p. 3.

approved jurisdictional determination<sup>4</sup> but did result in a “no-permit-required” letter to Respondent Land Partnership. Per USACE Guidance, a “no-permit-required” letter . . . cannot make any sort of determination regarding whether there are jurisdictional wetlands or other waterbodies on a site.” (cites omitted).

21. During their August 19, 2010 Site inspection, IDEM’s Brad Baldwin, and USACE’s Sarah Keller observed Site conditions showing that the forested wetland was reestablishing and there did not appear to be any further disturbance in the area that was initially cleared. *Hr’g Tr.* at 57:10-15; 117:17-22. Saplings were growing back; IDEM’s Baldwin walked through grass shoulder to head height. *Id.* at 49:18, 57:20-22. Baldwin had to stand on existing stumps to look over vegetation to see the area. *Id.* at 57:23 – 58:1. Trees were cleared and stacked up. *Id.* at 117:7-8. IDEM determined that the area growing back was larger than the 1.6-acre “water feature” identified by Respondent Yeley. *Id.* at 58:13-17, 122:7-16. IDEM’s Wetland Technical Specialist observed hydrology and hydrophytic plants coming back. *Id.* at 129:2-3. He observed standing water and saturation on Site. *Id.* at 129:12-13, 130:11-14. The parties stipulated that the Site was not a forested wetland at the time of the August 19, 2010 inspection. *March 23, 2021 Factual Stipulation (“Fact.Stip.”)*, p. 2, ¶ 12. Keller’s report did not constitute a Site wetlands delineation, nor did resulting documentation constitute USACE verification of a Site wetlands delineation or the JFNew delineation.

22. In response to an anonymous complaint, an IDEM representative conducted a Site inspection on February 11, 2013. *Tr. Ex. S-4*. The Site was cleared and prepared for row cropping, *Id.*, and contained soybean crop remnants from 2012 crop plantings. *Fact.Stip.*, p. 2, ¶ 13.

23. The Site was not listed on the US Fish & Wildlife’s National Wetlands Inventory for March, 2013 as a wetland. The inventory’s website contains a disclaimer that not all wetlands are on the map. *Fact. Stip.* p. 2, ¶ 17.

24. On May 2, 2014, IDEM issued a Notice of Violation (“NOV”) to Larry Yeley for failing to maintain and protect the existing beneficial uses, degrading the water quality, and interfering with the existing and potential uses of the wetland at the Site. *Tr. Ex. S-2*. Yeley received the NOV on May 3, 2014. *Tr. Ex. S-1*, FOF ¶ 5.

25. IDEM’s May 2, 2014 NOV specified the following violations:

- a. Clearing and grading a forested wetland resulting in the redistribution of fill, as observed during the April 2008, May 2009, and February 2013 inspections, in violation of Ind. Code § 13-30-2-1. *Tr. Ex. S-2*.
- b. Clearing and grading a forested wetland resulting in objectionable deposits, and for failing to maintain and protect existing beneficial uses, degrading water quality and interfering with existing and potential uses of the Wetlands in violation of and I.C. § 13-30-2-1 and 327 IAC 2-1-6(a). *Id.*, ¶ 4.

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<sup>4</sup> USACE Regulatory Guidance Letter, No. 08-02, ¶ 2(a)(3) (June 26, 2008).

- c. Failing to obtain a permit before clearing and grading a forested wetland, in violation of I.C. § 13-18-22, *et seq.*, and 327 IAC 7-1, *et seq.* *Id.*, ¶ 5. *See Fact.Stip.*, p. 3, ¶ 19, 20.

26. IDEM's September 14, 2018, IDEM Notice and Order of the Commissioner of the Indiana Department of Environmental Management for Case No. 2013-22079-Q ("Commissioner's Order") alleged unpermitted regulated wetland clearing, deposits and agricultural activity on the Site. *Tr. Ex. S-1*. IDEM's Commissioner's Order was addressed to Larry Yeley and to Larry & Carol Yeley Family Limited Partnership ("Yeley Family Limited Partnership"), all having the same McCordsville address, *Id.*, an address used consistently by IDEM throughout its direct communications to Larry Yeley and to the Yeley Family Limited Partnership.

27. The September 14, 2018 Commissioner's Order alleged the following violations:

- a. Placing fill in wetland areas, resulting in objectionable deposits to waters of the State at the Site, in violation of 327 IAC 2-1-6(a)(1) and IC §13-30-2-1. *Id.* at FOF ¶ 3.
- b. Not obtaining a permit before clearing and grading a state regulated forested wetland, in violation of Ind. Code § 13-18-22, *et seq.*, and 327 IAC 17-1, *et seq.* *Id.* at FOF ¶ 4.

28. The Commissioner's Order required Respondent to obtain an after-the-fact ("ATF") permit, or to restore the specified Site by removing all the discharged material from the wetlands and properly disposing of the fill. *Id.* at Order, ¶ 1. *See Fact.Stip.*, p. 3, ¶ 21.

- a. If the Respondent decides to restore the wetlands, a restoration plan and schedule must be submitted to IDEM. *Id.* at Order, ¶ 3.
- b. If the Respondent decides to submit an ATF permit, an application and mitigation plan must be submitted to IDEM. *Id.* at Order, ¶ 4. IDEM is requiring a 3.25:1 ratio and 10 years of monitoring at the mitigation site. *Id.*

29. The Commissioner's Order also required Respondent to pay a civil penalty of \$14,205. *Id.* at Order, ¶ 6.

30. IDEM derived the mitigation ratio of 3.25:1, based on the assumption that the Site was a Class 2 wetland, plus another 30% to "provide for the functional replacement loss. *Hr'g Tr.* 157:1-4.

31. On October 1, 2018, Respondent Larry & Carol Family Limited Partnership timely appealed IDEM's September 14, 2018 Commissioner's Order. Respondent Yeley did not seek to amend its petition for administrative review. On August 19, 2019, summary judgment briefing commenced; the parties fully briefed the issues and submitted designated evidence.

32. On May 13, 2020, the Court granted summary judgment ("Summary Judgment Order") to IDEM regarding the validity of the issuance of the May 2, 2014 NOV and September 14, 2018 Commissioner's Order to Larry & Carol Yeley Family Limited Partnership. The Court also held



that IDEM and OEA jurisdiction was limited to violations alleged beginning three years prior to IDEM's issuance of the May 2, 2014 NOV, or approximately May 3, 2011.

33. The Court further found that there was a genuine issue of material fact whether the Site is a wetland subject to enforcement, as asserted in the Commissioner's Order.

34. The parties dispute if the Site is a regulated wetland, and further dispute that if it is a wetland, whether it can now be regulated as a forested wetland.

"IDEM sometimes refers to areas of the site as a "wetland", and at other times as a "forested wetland". Per IDEM, "the forested classification is only cited in the findings of fact because the historical classification is necessary for purposes of determining what actions are required to resolve the violations. *IDEM's Sept. 19, 2019 Designation of Evidence in Response to (Yeley's) Motion for Summary Judgment ("IDEM Response")*, p. 6. IDEM further asserts that Respondent's 2007/2008 removal of trees changed the wetland classification from forested at the time IDEM asserted violations in 2013. IDEM Response, p. 11, Exs. 1, 2; *Respondent's (Summary Judgment) Motion*, p.2, Ex. E, ¶ 4. (citations added).

*Summary Judgment Order*, p. 5, ¶ 14.

35. In post-hearing briefing, IDEM asserted that the Site is a forested wetland.

36. On May 11, 2022, the final hearing was conducted as to whether the Site was a wetland subject to enforcement. The parties submitted post-hearing briefs and proposed findings of fact, conclusions of law and final orders. Per the parties' request, a Virtual Status Conference will be scheduled to determine whether and how parties may elect to address the applicability of wetland law Senate Enrolled Act 389 (2021), as codified, to the final determination in this case. Once administrative adjudication of the impact of the 2021 legislation has concluded, then this Order will be incorporated into a final order.

37. In post-hearing briefing, Respondent Yeley raised the issue of whether IDEM's requirement that landowners, not IDEM, obtain wetland delineation, was invalid as an unpromulgated rule. Respondent Yeley also raised the issues of hardship for Mr. Yeley, noting his advanced age, recent loss of his wife, financial impact from compliance, asserting that this case is based on IDEM's alleged motivation to seek enforcement on "12 acres . . . just a lot of wetland to let fall off . . . the radar". See *Summary Judgment Order*, p. 11, ¶ 10.

38. The USACE makes a jurisdictional determination whether a wetland is regulated as a water of the United States. *Hr'g Tr.*, 90:11-15. Once a wetland delineation has been verified by the USACE, IDEM applies the verified delineation as the controlling document for regulatory purposes. *Id.* at 88:15-23 to 89:1-2 and 195:7-11. The delineation is then in effect for a period of five years, *Id.* at. 89:10-11.

39. IDEM relied upon the JFNew wetland delineation for this Site. *Id.* at 39:9-12, 133:8-11, 149:11-17. IDEM believed that the Delineation was verified, meaning that the USACE verified

the JFNew delineation's wetland boundaries *Id.*, 221:18-222:10, and "(made) a jurisdictional determination to determine whether or not its regulated as a Waters of the United States or not regulated as a Waters of the United States." Then, "once the wetland's been delineated and verified by the Corps of Engineers, . . . that's at the point [IDEM] makes the class determination to determine how its regulated under IC 13-18-14." *Id.*, 88:15-89:2.

40. During its Site inspections, IDEM did not take data points because the 2008 Delineation was in effect during its inspections, including the February 11, 2013 Site Inspection. *Id.* at 123:19-21, 132:19-23 to 133:1-11, 149:11-17.

41. Changing Site conditions, as available, were documented in admitted photographs taken in 2008, 2009, 2010, and 2013. *Tr. Ex.* 9, 10, and aerial photographs from February 2, 2005, June 30, 2005, July 1, 2007, June 18, 2008, August 2010, February 26, 2012, and September 23, 2014. *Tr. Ex.* S-3. In the Site's northeast corner, three trees remained after initial Site clearing discovered in April, 2008. See photographs from 2009 and 2010, aerial photographs from June 18, 2008, August 2010, and February 26, 2012. *Id.* The three trees remain, until they are removed sometime between August 2010 and February 2013. *Id.* Row cropping on the Site is first visible in the 2013 photographs and the September 23, 2014 aerial photograph. *Id.*; *Tr. Ex.* 9.

42. In 2018, Respondent Yeley engaged wetlands consultant, Cardno Practice Lead Marc Woernle. *Tr. Exs.* C, S-D. Woernle testified he was first on-Site for a July 17, 2018 assessment. *Id.*, Woernle Aff., p. 1, ¶ 3; *Hr'g Tr.* p 270, 272. Woernle opined that the Site contained no regulated waters, including wetlands and streams, and that per documentation from 2010 and 2013, the Site could not have restored itself to constitute a forested wetland by 2013. *Id.*, p. 2, ¶ 6; see Ex. 2, Sept. 10, 2018 Report ("Woernle Report"). Woernle did not believe that any wetlands formerly on the Site were as big as stated in IDEM's testimony or in the Delineation. *Hr'g Tr.*, p. 247, 272.

43. One basis for Woernle's conclusion that the Site was not a wetland in 2011 or 2012 is that the Site "seemed to become drier over time, not wetter, as one would assume" given the removal of the trees. *Id.*, 256:19-21. Woernle explained that "usually in a forested wetland system, you take the trees down, the watering system increases, and this is due because—this happens because wetland trees, like any other tree, take up a lot of water," and that for example "a ten-inch [diameter at breast height] tree would take up about a hundred gallons of water a day. So, when a forested wetland is impacted, there's usually more water, not less. There's usually more wetland plants, not less, and that is due to the lack of evapotranspiration that the tree is providing." *Id.*, 256:2-15.) There were also no drainage tiles to account for the removal of water. *Id.* 257:8-258:9.

44. Woernle also saw no evidence that the Site had been graded or filled. *Id.*, 260:9-11. He testified that if "the site was manipulated in a way that there would be some kind of topographic relief from the eastern portion, . . . from the Pella into the Miami [soils], you'd see some kind of topographic relief . . . you know, a step down." *Id.*, 259:3-18. Instead, Woernle "didn't see any transition from elevation . . . It was a smooth transition." *Id.*

45. Woernle also reviewed the JFNew report. In his opinion, the JFNew report did not establish that a wetland existed on Site in 2008 apart from the Water Feature, as the findings were inconclusive and based on several assumptions: *Id.*, 247:15-248:6. Despite this conclusion, he testified that if he were to assume the Site was a wetland after the 2008 clearing: (1) “more than 50 percent of the site, excluding the water feature area, as it existed in 2007, [had] been disturbed or affected by human activity or development by removal of natural vegetation” *Id.*, 260:16-21; and (2) that not including the water feature area, the Site “support[ed] only minimal wildlife or aquatic habitat or hydrologic functions because it did not provide critical habitat or threaten or endanger species” or “possess significant hydrologic function.” *Id.*, 261:11-23.

46. To return the Site to compliance with applicable Indiana wetlands laws and regulations, IDEM requested restoration consistent with forested wetland mitigation standards. *Hr’g Tr.* at 158:20-21. IDEM thus requested that Respondent Yeley restore the impacted wetlands or apply for after-the-fact (“ATF”) permit approval. *Id.* p. 155:15-17. Should Respondent Yeley seek an ATF permit, the Delineation supported mitigation requirements of Site restoration at the ratio of 3.25 acres of restoration to 1 acre of disturbed wetlands, and ten years of monitoring for mitigation requirements. *Id.* at 158:1-19.

47. As for the amount of civil penalty, IDEM calculated a civil penalty of \$14,205 using IDEM’s Civil Penalty Worksheet. *Id.* at 202:17-18; *Tr. Ex. S-11*. IDEM assessed a moderate potential for harm and major deviation from the rule. *Hr’g Tr.*, 203:16-18. The resulting amount assessed was within the normal matrix. *Id.* at 204:4-12. IDEM assessed a civil penalty for 1 violation and 1 violation day, despite the alleged violations occurring over several years. *Tr. Ex. S-11; Hr’g Tr.* p. 235:8-14. Although an economic benefit was added initially to the base amount (making the total assessed civil penalty \$19,500), *Tr. Ex. S-11*, the economic benefit was reduced prior to inclusion in the Commissioner’s Order, resulting in an assessed civil penalty of \$14,205. *Hr’g Tr.*, p. 205:2-3, see also *Tr. Ex. S-1*.

### **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 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.*

2. This is an Order, issued pursuant to I.C. § 4-21.5-3-27. Findings of Fact that may be construed as Conclusions of Law, or Conclusions of Law that may be construed as Findings of Fact, are so deemed. Per the parties’ request, the parties may elect to address how wetlands law Senate Enrolled Act 389 (2021), as codified, applies to the final determination in this case. Once administrative adjudication of the 2021 legislation’s impact has concluded, then this Order will be incorporated into a final order.

3. This Court must apply a *de novo* standard of review to this proceeding when determining the facts at issue. 315 IAC 1-3-10(b); *Indiana Dept. of Natural Resources v. United*

*Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993); *Jennings Water, Inc. v. Office of Env'tl. Adjudication*, 909 N.E.2d 1020, 1025 (Ind. Ct. App. 2009). Findings of fact must be based exclusively on the evidence presented to the Environmental Law Judge ("ELJ"), and deference to the agency's initial factual determination is not allowed. *Id.*; I.C. § 4-21.5-3-27(d). "The ELJ . . . serves as the trier of fact in an administrative hearing and a *de novo* review at that level is necessary. *United Refuse*, 615 N.E.2d 100, 103. The ELJ does not give deference to the initial determination of the agency." *Indiana-Kentucky Elec. Corp v. Comm'r, Ind. Dep't of Env'tl. Mgmt.*, 820 N.E.2d 771 (Ind. Ct. App. 2005). "*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 (Ind. Ct. App. 1981).

4. OEA is required to base its factual findings on substantial evidence. *Huffman v. Ind. Office of Env'tl. Adjudication.*, 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). 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); *Gas America 347*, 2004 OEA 123, 129; *Blue River Valley Area Sanitary Sewer & Water Projects*, 2005 OEA 1, 11-12; *Marathon Point Service & Winimac Service*, 2005 OEA 26, 41.

5. Respondent Yeley argues that IDEM's requirement that wetland delineations be done by the landowner, and not IDEM, is invalid as an unpromulgated rule. The 1987 Manual and 2010 Manual Supplement only describe the process for conducting a wetland delineation, not which entity is to conduct it. Respondent Yeley first raises this issue in his September 1, 2022 Post-Hearing Brief and (proposed) Findings of Fact, Conclusions of Law and Judgment. This issue is not raised in Respondent Yeley's Petition for Administrative Review, contrary to 315 IAC 1-3-2(e). OEA must apply a *de novo* standard of review to issues raised in a petition for administrative review (or permitted petition amendments). "De Novo review does not provide an unlimited opportunity to continually raise new issues throughout the proceedings. To the extent that Petitioners and Intervenor have raised new issues not included in their Petitions for Review, this Court is not required to consider these issues." *Great Lakes Transfer Station*, 2006 OEA 24, 28; *Wadesville/Blairsville WWTP*, 2022 OEA 1, 9. As Yeley's argument was not raised in its Petition, and the Petition was not amended to include this issue, the issue is not subject to the Court's consideration.

6. Per I. C. § 13-18-22-1(c), "[t]he goal of the permitting program for wetland activities in state regulated wetlands is to:

- (1) promote a net gain in high quality isolated wetlands; and
- (2) assure that compensatory mitigation will offset the loss of isolated wetlands allowed by the permitting program.

7. "Wetland activity" is defined as the discharge of dredged or fill material into an isolated wetland. I.C. § 13-11-2-265.6. Per I.C. § 13-18-22, *et seq.*, and 327 IAC 17-1, *et seq.*, a person proposing a wetland activity in a state regulated wetland must first obtain a permit to authorize the wetland activity, before beginning the wetland activity.

8. "Wetland delineation" is defined in Ind. Code § 13-11-2-265.8 as a technical assessment:

(A) of whether a wetland exists on an area of land; and

(B) if so, of the type and quality of the wetland based on the presence or absence of wetland characteristics, as determined consistently with the Wetlands Delineation Manual, Technical Report Y-87-1 of the United States Army Corps of Engineers.

9. A wetland determination requires assessment that the site "supports a prevalence of (1) hydrotrophic vegetation, (2) a predominance of hydric soils, and (3) wetland hydrology under normal circumstances." *Boucher v. United States Dep't of Agriculture*, 934 F.3d530 (7<sup>th</sup> Cir. 2019). In *Boucher*, in the mid-1990's, Boucher cut down several trees in the area of a farm which the United States Department of Agriculture had determined was a wetland. *Id.* The Bouchers believed that their arguments against the wetland classification were successful, as no enforcement action was pursued. *Id.* at 540, 541. Approximately twenty years later, Boucher's request to remove structures from a portion of the property led the USDA to discover that a final technical determination for the initial clearing had not been completed. *Id.* at 542. For lack of all three hydric characteristics, the *Boucher* Court held that the wetland delineation was noncompliant with applicable law or United States, Army Corps of Engineers ("ACE") guidance, and held in favor of Boucher. *Id.* at 533. *Boucher* further noted, that as for the cleared Site, "consideration of wetland hydrology is particularly important because some plant communities are slow to respond to changes in hydrology and soil features are very resistant to change."<sup>5</sup> And, "many plant species can grow successfully in both wetlands and nonwetlands, and hydrotrophic vegetation and hydric soils may persist for decades following alteration of hydrology that will render an area a nonwetland."<sup>6</sup>

10. Respondent Yeley's 2008 Delineation complied with I.C. § 13-11-2-265.8, and was completed by a JFNew team which included a botanist, certified professional soil scientist, and senior wetland delineator. The Delineation provided the necessary information to support the conclusion that all three criteria required by the USACE in the Wetlands Delineation Manual were met to conclude the Site contained 11.82 acres of forested wetland in the cleared area at the Site. *Tr. Ex. 6*, p. 2, 3; *Hr'g Tr.* p. 133:8-11, 279:2. The Delineation's conclusion was based on the field inspection conducted in July 2008 and a review of then-available resources. *Id.* As set forth in the Delineation and through testimony from IDEM representatives and supporting documentation from federal agencies verifying the determination that the wetland was a state regulated forested wetland, the determination is consistent with the Wetlands Delineation Manual, Technical Report Y-87-1 and complies with the requirements set forth in *Boucher v. United States Dep't of Agriculture*, 934 F.3d530 (7<sup>th</sup> Cir. 2019).

11. In 2018, Respondent Yeley engaged consultant, Marc Woernle. *Hr'g Tr.* p. 270:5. Woernle first visited the Site in 2018, ten years after the Site had been mechanically cleared by Respondent Yeley and the Delineation was completed, *Id.* at 272:1-2, and five years after the

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<sup>5</sup> *Boucher* at 539.

<sup>6</sup> *Id.* at 535.

2008 Delineation expired in 2013. Mr. Woernle's review was therefore limited by his having to rely upon after-the-fact documentation and a disturbed Site. Woernle's review was significantly impeded by Respondent Yeley's Site activity in 2008 and prior, and by Respondent Yeley's subsequent Site use for crops. Woernle noted that the exhibit containing the Delineation is missing supporting documents. *Id.* at 41, 42. Witness testimony from both parties and photographic evidence independently confirmed facts elicited from the Delineation, resulting in credible and substantial testimony from the witnesses, so that the Court may conduct a de novo *Boucher* analysis. By substantial evidence, the Delineation exhibit's document deficiencies (missing pages, draft markings) did not preclude witness analysis of the document's content or the validity of the pages presented. However, Woernle disputed the size, not the presence, of an on-Site wetland. *Id.*, p. 247:20-23, 272:18-22. Substantial evidence supports the contents of Respondent Yeley's 2008 Site Delineation. Substantial evidence also supports Woernle's characterization of the site in 2018, that to the extent the Site is a wetland, (1) "more than 50 percent of the site, excluding the water feature area, as it existed in 2007, [had] been disturbed or affected by human activity or development by removal of natural vegetation" *Id.*, 260:16-21; and (2) that not including the water feature area, the Site "support[ed] only minimal wildlife or aquatic habitat or hydrologic functions because it did not provide critical habitat or threaten or endanger species" or "possess significant hydrologic function." *Id.*, 261:11-23.

12. As the USACE reviewed and verified Yeley's 2008 JFNew Delineation, and made a jurisdictional determination, the 2008 Determination was valid for five years, August, 2008 through August, 2013, and could only be changed by the USACE. *Hr'g Tr.* p. 195:7-11, 16-18. No new information was submitted to the USACE to overturn the 2008 Delineation. Site conditions can change for various reasons such as increasing or decreasing in size. *Id.*, p. 40:13-16. By substantial evidence and Delineation regulations, Respondent Yeley's Delineation applies to the Site during the active term of the Delineation, from 2008 to 2013. Even if not verified by USACE, the JFNew Delineation contains sufficient evidence to conclude that the Site was a forested wetland prior to Respondent Yeley's 2007/2008 removal of trees.

13. Witness testimony provided substantial evidence that Respondent Yeley's 2008 Delineation confirmed the presence of a state regulated forested wetland on the Site prior to its disturbance, discovered in April 2008. *Tr. Ex. 6*. Further, on summary judgment, this Court previously held that the parties did not dispute that the Site was a wetland in 2007, prior to the disturbance. *Summary Judgment Order*, p. 14, Conclusion of Law ¶ 17 (May 13, 2020). IDEM documents, witness testimony, and the Respondent's own admission acknowledge that mechanical clearing took place resulting in the discharge or dredged or fill material into a wetland. *Tr. Ex. 5-7; Hr'g Tr.*, p. 16:15-23; *Summary Judgment Order*, p. 5, Finding of Fact ¶ 13. By substantial evidence, the Yeley site contained 11.82 acres of a state-regulated forested wetland prior to Site disturbance discovered in April, 2008.

14. Continuing alterations to the Yeley Site did not change the Site's wetland class determination. The record in this cause contains substantial evidence that the Site was a forested wetland prior to Respondent Yeley's 2007/2008 removal of trees. IDEM had asserted that the removal of trees changed the wetland classification from forested at the time IDEM

asserted violations in 2013. However, per I.C. § 13-11-2-25.8(b), “a wetland or setting is not considered disturbed or affected as a result of an action taken after January 1, 2004, for which a permit is required under IC 13-18-22 but has not been obtained.” As the wetland activity discovered in April, 2008 was unpermitted, Respondent Yeley’s activity in the wetland could not be considered to alter the wetland for purposes of assigning a Class determination. Ind. Code § 13-11-2-25.8(b). IDEM provided substantial evidence in the form of provided testimony, photographic evidence, and supporting documents to meet IDEM’s burden of proof that the Site remained a wetland in 2010. Therefore, by law, the Site remained a forested wetland during the inspections in August, 2010 and February 2013, as established through Respondent Yeley’s Delineation. Site conditions observed by IDEM staff in August, 2010 were the basis for IDEM’s conclusion that the forested wetland was reestablishing, there did not appear to be any further disturbance in the area that was initially cleared; thus, IDEM took no further enforcement action until it conducted its February, 2013 Site inspection.

15. In February, 2013, the Site had been converted to cropland. *Tr. Ex. S-4*. IDEM presented substantial evidence that the mechanical movement of material as well as the grading and manipulation of the hammocks and hills would have placed fill material into the wetland. *Hr’g Tr. p. 165:17-23, 166:1-6, 168:22-23, 169:1-4*. Witness testimony and photographs provide substantial evidence that to convert the Site to agricultural use, vegetation, brush, stumps, and the three trees in the northeast corner of the Site would have had to be mechanically removed, resulting in the placement of dredged or fill material into the wetland. The unpermitted activity observed in February 2013 resulted in objectional deposits into waters of the State in violation of I.C. § 13-30-2-1 and 327 IAC 2-1-6(a)(1) and as stated in the Commissioner’s Order. *Tr. Ex. S-1*.

16. Substantial and reliable evidence supports the conclusion that even if the JFNew Wetland Delineation is not USACE-verified, the Site is a wetland subject to IDEM regulation. Witnesses analyzed and agreed as to facts contained in JFNew’s 2008 Delineation, using these facts, along with other, limited photographs and data, to inform their testimony as to what type of self-restoration was occurring after the Site was cleared in 2008, then observed as cleared again in 2013. The Court acknowledges deficiencies in the JFNew Delineation, but those deficiencies diminish the weight the Delineation is to be given. Data contained in the Delineation was deemed of sufficient reliability so as to inform witness analysis of the data. Substantial and reliable evidence exists as to the three wetland characteristics required by *Boucher*: wetland hydrotrophic vegetation, predominance of hydric soils, and wetland hydrology. Per application of *Boucher*, the Site is a wetland, and is subject to IDEM regulation.

17. If Site examination is limited to contemporary conditions, substantial evidence shows that the Site was not a forested wetland. As a result of the USACE’s and IDEM’s 2010 inspection, the Site was observed to be restoring to IDEM’s satisfaction. As a result of IDEM’s 2013 Site inspection, the restoration growth had been removed for soybean crop cultivation. Until final hearing, IDEM’s position was that the Site was not a forested wetland during the time periods relevant to the Commissioner’s Order – a position changed by legal authority resulting from legislative changes, which required IDEM to apply wetlands classifications based on conditions documented since 2004. Prior to its 2007/2008 disturbance, the Site was a forested

wetland. As of 2018, Respondent Yeley consultant Woernle's observations present the only reliable, substantial evidence of current Site conditions. Although Woernle concluded that the Site was not a wetland subject to regulation, his hypothetical response, based on the contrary assumption that the Site was a regulated wetland, was that: (1) "more than 50 percent of the site, excluding the water feature area, as it existed in 2007, [had] been disturbed or affected by human activity or development by removal of natural vegetation" *Hr'g Tr.*, 260:16-21; and (2) that not including the water feature area, the Site "support[ed] only minimal wildlife or aquatic habitat or hydrologic functions because it did not provide critical habitat or threaten or endanger species" or "possess significant hydrologic function." *Id.*, 261:11-23.

18. As the Site remained a state regulated forested wetland pursuant to I.C. § 13-11-2-25.8(b), the discharge of dredged or fill material into the wetland observed in February, 2013 is "wetland activity", per I.C. § 13-11-2-265.6, requiring a permit under I.C. § 13-18-22, *et seq.* and 327 IAC 17-1, *et seq.* Respondent Yeley did not have a permit prior to commencing the wetland activity, in violation of I.C. § 13-18-22, *et seq.*, and 327 IAC 17-1, *et seq.* *Hr'g Tr.*, p. 14:15-19. By substantial evidence, for failure to obtain a permit, Respondent Yeley violated I.C. § 13-8-22, *et seq.*, and 327 IAC 17-1, *et seq.*, as cited in the Commissioner's Order.

19. Yeley's wetland Site activity is not exempted farming activity. I.C. § 13-18-22-1(b)(3)(A) exempts the permit requirement including the following activities listed in Sec. 404(f) of the Clean Water Act: "normal farming, silviculture, and ranching activities, such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices . . ."

20. The United States Environmental Protection Agency ("USEPA") and the USACE have stated that to qualify for the "normal farming" exemption, the activity "must be part of an 'established (i.e., ongoing) farming, silviculture, or ranching operation.'" *March 25, 2014 U.S. EPA and U.S. Dep't of the Army Interpretive Rule Regarding Applicability of Clean Water Act Section 404(f)(1)(A)*, p. 2. In August 2010, the Site remained classified as a forested wetland pursuant to I.C. § 13-11-2-25.8(b), was not being farmed, and was populated with plants such as tall grasses and saplings. By substantial evidence, the farming activity observed in February, 2013 on the Yeley Site did not qualify the Site as an established farm as exempted under I.C. § 13-18-22-1(b)(3)(A).

21. By substantial evidence, Complainant Indiana Department of Environmental Management proved that Petitioner (Respondent below) Yeley caused unpermitted discharge of dredged or fill material into a wetland in violation of I.C. § 13-18-22, *et seq.*, I.C. § 13-30-2-1, 327 IAC 2-1-6(a)(1), and 327 IAC 17-1, *et seq.*, as stated in the September 14, 2018 Commissioner's Order.

22. As Respondent Yeley's unpermitted discharge of dredged or fill material into a wetland violated I.C. § 13-18-22, *et seq.*, I.C. § 13-30-2-1, 327 IAC 2-1-6(a)(1), and 327 IAC 17-1, *et seq.*, IDEM properly required Respondent Yeley to achieve compliance by either removing the dredged or fill material through restoration of the Site or to obtain an ATF permit for the activity that would require off-site mitigation. *Tr. Ex. S-1*, p. 3, 4, ¶¶ 1-4.



23. Per I.C. § 13-30-4-1, IDEM is authorized to assess a civil penalty not to exceed \$25,000 per day for any of the Respondent's violations of the water pollution control law. IDEM calculated its civil penalty assessment per its Civil Penalty Policy. ID No. Enforcement 99-0002-NPD, adopted in accord with I.C. § 13-14-1-11.5; see *IDEM v. Schnippel Construction, Inc.*, 778 N.E.2d 407, (Ind.Ct.App. 2002). The Civil Penalty Policy calculations are: (1) determining a base civil penalty dependent on the severity and duration of the violation, (2) adjusting the civil penalty or special factors and circumstances, and (3) considering the economic benefit of noncompliance. *Id.*; *Glidden Fence Co., Inc.*, 2015 OEA 1, 9.

24. Two factors are then applied to the base civil penalty: (1) the potential for harm, and (2) the extent of deviation. *Id.*

25. In the Civil Penalty Policy, the potential for harm is determined by considering "the likelihood and degree of exposure of persons or the environment to pollution" or "the degree of adverse effect of noncompliance on statutory or regulatory purposes or procedures for implementing the program." *Id.*; *Civil Penalty Policy*, p. 3. In this case, substantial evidence did not address pollution exposure, but did support a moderate potential for harm, based on the degree of noncompliance on statutory or regulatory purposes or procedures for implementing the program supports.

26. The Civil Penalty Policy's extent of deviation relates to the degree to which the requirement is violated. A major deviation "deviates from the requirements of the regulation, permit, or statute to such an extent that there is substantial noncompliance." *Civil Penalty Policy, Id.* Substantial evidence supports a major extent of deviation.

27. IDEM also determined that the violation was moderate harm, major deviation. IDEM assessed one day for one violation, without an increase for the economic benefit received by the Respondent due to its failure to comply with Indiana environmental laws and regulations. *Hr'g Tr.* p. 205:2-6, 206:19-23, 235:13-14. IDEM's assessment of one day, and no increase for economic benefit was supported by the evidence. In evaluating the substantial evidence in this cause as applied to the Civil Penalty matrix, a civil penalty of \$12,500 is proper based on the Civil Penalty Worksheet and the factors of the violations. See *Tr. Ex. S-11*.

28. For all of the foregoing reasons, the Indiana Department of Environmental Management's September 14, 2018 Commissioner's Order should be affirmed, with the exception that the civil penalty is \$12,500. Larry & Carol Yeley Family Limited Partnership's October 1, 2018 Petition for Administrative Review and Adjudicatory Hearing should be denied.

### **ORDER**

For all the forgoing reasons, **IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that the Larry & Carol Yeley Family Limited Partnership's October 1, 2018 Petition for Administrative Review of the September 14, 2018 issuance of the Notice and Order of the Commissioner of the Indiana Department of Environmental Management Case No. 2013-22079-Q is **DENIED**. The Indiana Department of Environmental Management's September 14, 2018 Commissioner's Order is **AFFIRMED**, with the exception that the civil penalty assessment is \$12,500.

**IT IS FURTHER ORDERED** that this matter is scheduled for a Virtual Status Conference on **July 31, 2023, 10:00 AM, EDT**, to determine whether and how parties may elect to address the applicability of wetland law Senate Enrolled Act 389 (2021), as codified, to the final determination in this case. Once administrative litigation and adjudication of the impact of the 2021 legislation has concluded, then this Order will be incorporated into a final 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. Applicable provisions of I.C. § 4-21.5-5, et seq., state procedures available for judicial review of this Order.

**IT IS SO ORDERED** this 30<sup>th</sup> day of June, 2023 in Indianapolis, IN.

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Hon. Mary Davidsen  
Chief Environmental Law Judge