

**Commissioner, Indiana Department of Environmental Management, v.
Jimmerson Bay Developers, LLC, IDEM Case No. 2005-14490-W
Angola, Steuben County, Indiana
2010 OEA 36, (06-W-E-3854)**

OFFICIAL SHORT CITATION NAME: When referring to 2010 OEA 36, cite this case as
IDEM v. Jimmerson Bay Developers, LLC, 2010 OEA 36.

TOPICS:

327 IAC 2-1-6	wetland
327 IAC 5-2-2	lake
327 IAC 15-2	surface water
327 IAC 15-5	Rule 5
I.C. § 13-18-4-5	general permit
I.C. § 13-30-2-1	individual permit
I.C. § 13-30-3-3	mediation
I.C. § 13-30-3-4	Summary Judgment
Ind. Trial Rule 36(A)	Request for Admissions
Civil Penalty Policy	Pro se litigant
construction	storm water
sedimentation	off-site
Notice of Termination (NOT)	erosion control measures
Notice of Intent (NOI)	
National Pollution Discharge Elimination System (NPDES)	

PRESIDING JUDGE:

Mary L. Davidsen

PARTY REPRESENTATIVES:

IDEM: Denise A. Walker, Esq.
Petitioner: Michael Leckner, Holly Boyd

ORDER ISSUED:

April 5, 2010

INDEX CATEGORY:

Water

FURTHER CASE ACTIVITY:

[none]

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“Site”). The Site’s multiple residential lots total 23.3 acres. As planned, Jimmerson Bay’s development activities disturbed more than one (1) acre of land as a part of a larger common plan of development or sale.

2. Jimmerson Bay had neither an individual nor a general National Pollution Discharge Elimination System (“NPDES”) permit prior to initiating land disturbing activities at the Site.
3. Jimmerson Bay did not submit a Notice of Intent for the Site (“NOI”) to disturb five (5) or more acres of land. IDEM did not approve or issue a verified Notice of Termination (“NOT”) letter for the Site.
4. For Site Section I, IDEM’s routine and complaint site inspections from July 7, 2004, October 28, 2004, January 4, 2005, May 18, 2005, May 19, 2005, May 28, 2005, July 6, 2005 and September 18, 2006 were provided to Jimmerson Bay’s project owner’s contact Phil Meyers and/or Mr. Leckner. *Ex. B.* IDEM inspected Section II on May 18, 2005, May 26, 2005, May 28, 2005 and July 6, 2005; the July 6, 2005 inspection report was attached as an exhibit to IDEM’s Motion for Summary Judgment and was provided to Mr. Leckner. *Ex. C.* Initially, the site inspections designated areas of concern as “satisfactory”. *Ex. B, C.* As the inspection period continued, the areas of concern progressively deteriorated to “marginal”, then “unsatisfactory”, along with high potential for off-site sedimentation and documented lack of, or failed, erosion and sediment control, including a storm outlet, which deposited off-site sedimentation in a wetland. *Id.* The January 4, 2005 Report noted that “[i]nlet protection broke down and allowed sediment to the storm system and out to the lake”. *Ex. B.*
5. In the Section I development area, houses constructed on-site were built on top of a steep ridge which dropped off directly into a wetland and lake below. *Ex. B, D.* The sandy soil materials were unstable. *Id.* Trees on the ridge were cleared, which resulted in an unobstructed view of the lake, and in soil instability and sediment washing from the top of the ridge into the lake and wetland. *Id.* Water discharged from the residential downspouts also contributed to site erosion. *Id.* A walkway constructed on the edge of the wetland area resulted in sedimentation and erosion, thus damaging the wetland. *Id.*
6. IDEM’s June 8, 2005 Inspection Summary and Violation Letter, transmitted to Jimmerson Bay, described IDEM’s site observations and problems. *Ex. E.*

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7. IDEM issued a Notice of Violation and Proposed Agreed Order to Jimmerson Bay Creek (“NOV”) on March 21, 2006, citing violations of the National Pollution Discharge Elimination System (“NPDES”) requirements and of Rule 5. *Ex. F, NOV.* The NOV stated, and Jimmerson Bay admitted², that Jimmerson Bay failed to submit a Notice of Intent letter (“NOI”) for land-disturbing activities in Section 1, failed to implement and maintain sediment and erosion control measures at the Site, installed unauthorized storm water outlets into wetlands on Site, discharged earthen fill materials into waters of the state, and into a wetland, without a valid NPDES permit. *Id.; see also Admissions, Ex. A, p. 6.* Per Ind. Code § 13-30-3-3, the NOV cited violations of 327 IAC 5-2-2 (2006)³ (basic NPDES requirements), 327 IAC 15-2, *et seq.* (basic NPDES general permit rule requirements), 327 IAC 15-5 (“Rule 5” Storm Water Run-Off Associated with Construction Activity), 327 IAC 2-1-6(a)(Minimum Surface Water Quality Standards), I. C. § 13-18-4-5 (Unlawful Discharge of Deleterious Substances) and I.C. § 13-30-2-1 (Specific Acts Prohibited). *Ex. F.*
8. Following a settlement conference, IDEM mailed a Proposed Agreed Order to Jimmerson Bay on June 5, 2006. On November 27, 2006, IDEM mailed a Notice of Final Settlement Offer to Jimmerson Bay. *Ex. G.* After the parties attempted but did not succeed at negotiating mutually acceptable terms for the Agreed Order, on December 19, 2006, IDEM’s Commissioner issued a Notice and Order (“Commissioner’s Order”) pursuant to I.C. § 13-30-3-4. *Ex. H, Commissioner’s Order.*
9. The Commissioner’s Order required Jimmerson Bay to: (1) immediately cease and desist violation of 327 IAC 5-2-5(a), 327 IAC 15-5-6, 327 IAC 15-5-7(b), 327 IAC 5-2-2, 327 IAC 2-1-6(a), I.C. § 13-18-4-5 and I.C. § 13-30-2-1; (2) submit a NOI for Section 1 of the Site within thirty (30) days; (3) submit an updated Construction Plan and Storm Water Pollution Prevention Plan within thirty (30) days; (4) immediately implement effective erosion and sediment control measures, a self-monitoring program, and measures designed to protect the wetlands areas from additional dredge and fill material; (5) submit an “Application for Authorization to Discharge Dredged or Filled Material to Isolated Wetlands and/or Waters of the State”, State Form 51821, within thirty (30) days; (6) maintain certain records, document completion of milestones, and submit an annual report; and (7) pay a civil penalty of forty-three thousand dollars (\$43,000.00). *Ex. H.*
10. Jimmerson Bay, through counsel, timely filed a Petition for Administrative Review (“Petition”) of the Commissioner’s Order on January 9, 2007. After administrative litigation commenced in this forum, the parties attempted to negotiate a resolution to all or part of the issues in controversy in this cause.

² See Paragraph 12, below, for specific findings that by failing to respond to IDEM’s March 2, 2009 Requests for Admission in a timely manner, the Admissions were deemed admitted, per Ind. Tr. R. 36(A) as ordered by the Court on June 15, 2009.

³ The 2006 and 2007 versions of the IAC apply to the facts of this cause; both versions are identical.

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11. Per this Court's June 4, 2007 Order, the parties engaged in mediation, on September 6, 2007. In its Motion for Summary Judgment, IDEM indicated that the parties arrived at an agreement in principal, but did not execute a written settlement agreement, although IDEM agreed to Jimmerson Bay's request for additional time to gather certain documents. *IDEM Motion*, p. 8. IDEM further indicated that Jimmerson Bay failed to respond to IDEM's January 5, 2009 letter requesting execution of settlement in five (5) days. *Id.*; see also *Ex. J and IDEM's January 20, 2009 Status Report and Request for Status Conference*. The Court's January 21, 2009 Order set this cause for Status Conference on February 9, 2009, in order to resolve procedural and scheduling conflicts. On February 5, 2009, the Court granted Jimmerson Bay's counsel leave to withdraw and denied Jimmerson Bay's motion to continue the February 9, 2009 status conference. At the February 9, 2009 status conference, Respondent Jimmerson Bay attended telephonically by Michael Leckner and Holly Boyd. The parties agreed upon scheduling for subsequent litigation, including the final prehearing conference and final hearing settings, which agreement was contained in the Court's February 9, 2009 case management order. Per Mr. Leckner's request, copies of court orders were distributed to himself and to Holly Boyd at an address specified by Mr. Leckner. None of the Court's orders transmitted to Mr. Leckner and Ms. Boyd were returned to the Court; the Court finds that its orders were served on Respondent Jimmerson Bay.

12. As part of the litigation of this cause, IDEM filed the Commissioner's First Set of Discovery Requests, including Requests for Admission on March 2, 2009 ("Discovery Requests"). *Ex. A*. On April 3, 2009, Mr. Leckner filed "Respondent's Motion for Enlargement of Time Within Which to Retain Legal Counsel and Respond to Complainant's Requests. On April 15, 2009, IDEM filed a Motion to Deem Requests for Admission Admitted per Indiana Trial Rule 36(A), noting that Respondent Jimmerson Bay had not responded to IDEM's March 2, 2009 Discovery Requests, that the Court had not issued discovery response deadlines; therefore the Requests for Admission were deemed admitted per Ind. Tr. R. 36. Jimmerson Bay did not respond to IDEM's discovery requests; on June 15, 2009 the Court ordered the Requests for Admission deemed admitted.

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13. Complainant IDEM's Motion for Summary Judgment was filed on June 29, 2009. The parties did not submit further briefing or Proposed Findings of Fact, Conclusions of Law and Orders, nor was oral argument requested as provided in Court's February 9, 2009 scheduling order.⁴ No further submissions were made by either party. As provided in the Court's February 9, 2009 scheduling order, the cause was set for a Final Prehearing Conference on September 3, 2009, in preparation for the September 17, 18, 2009 Final Hearing. Counsel for Complainant IDEM attended the September 3, 2009 Final Prehearing Conference. Respondent Jimmerson Bay was served notice of, but did not attend, either the September 3, 2009 Final Prehearing Conference or the September 17, 2009 Final Hearing setting. Respondent Jimmerson Bay did not seek to reschedule or seek leave from attending the September, 2009 events. At the September 3, 2009 Final Prehearing Conference, IDEM's counsel indicated that it had no further evidence to present to the Court.

CONCLUSIONS OF LAW

1. The Indiana Department of Environmental Management ("IDEM") is authorized to implement and enforce specified Indiana environmental laws, and rules promulgated relevant to those laws, per I.C. § 13-13, *et seq.* The Office of Environmental Adjudication ("OEA") has jurisdiction over the decisions of the Commissioner of IDEM and the parties to this controversy pursuant to I.C. § 4-21.5-7, *et seq.*
2. This is a Final Order issued pursuant to I.C. § 4-21.4-3-27. Findings of Fact that may be construed as Conclusions of Law and Conclusions of Law that may be construed as Findings of Fact are so deemed.
3. This Court must apply a *de novo* standard of review to this proceeding when determining the facts at issue. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993), *Indiana-Kentucky Electric v. Commissioner, Indiana Department of Environmental Management*, 820 N.E.2d 771 (Ind. Ct. App. 2005). Findings of fact must be based exclusively on the evidence presented to the ELJ, I.C. § 4-21.5-3-27(d). Deference to the agency's initial determination is not allowed. *Id.* "*De novo* review" means that "all issues are to be determined anew, based solely upon the evidence adduced at that hearing and independent of any previous findings." *Grisell v. Consol. City of Indianapolis*, 425 N.E.2d 247, 253 (Ind. Ct. App. 1981).

⁴ As a courtesy to the parties, the February 9, 2009 scheduling order was repeated in the Court's June 15, 2009 Order.

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4. The OEA may enter judgment for a party if it finds that “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits and testimony, if any, show that a genuine issue as to any material fact does not exist and that the moving party is entitled to judgment as a matter of law.” I.C. § 4-21.5-3-23. The moving party bears the burden of establishing that summary judgment is appropriate. *Id.*; *see also* I.C. § 4-21.5-3-14(c). All facts and inferences must be construed in favor of the non-movant. *Gibson v. Evansville Vanderburgh Building Commission, et al.*, 725 N.E.2d 949 (Ind. Ct. App. 2000). When the moving party sets out a prima facie case in support of the summary judgment, the burden shifts to the non-movant to establish a factual issue. *City of North Vernon v. Jennings Northwest Regional Utilities*, 829 N.E.2d 1, (Ind. 2005), *Tibbs v. Huber, Hunt & Nichols, Inc.*, 668 N.E.2d 248, 249 (Ind. 1996). All doubts as to the existence of a material issue must be resolved against the moving party. *Id.* “A genuine issue of material fact exists where facts concerning an issue that would dispose of the litigation are in dispute or where the undisputed facts are capable of supporting conflicting inferences on such an issue.” *Laudig v. Marion County Bd. of Voters Registration*, 585 N.E.2d 700, 703 - 704 (Ind. Ct. App. 1992). Further, the Indiana Tax Court in *Allied Collection Service Inc. v. Ind. Dept. of State Revenue* (Cause No. 49T10-0608-TA-76, December 22, 2008) stated, “If there is any doubt when ruling on a motion (or motions) for summary judgment as to what conclusion the Court could reach, the Court will conclude that summary judgment is improper, given that it is neither a substitute for trial nor a means for resolving factual disputes or conflicting inferences following from undisputed facts. *See Owens Corning Fiberglass Corp. v. Cobb*, 754 N.E.2d 905, 909 (Ind. 2001) (citations omitted).” When the non-movant does not respond, the movant is still required to meet its burden of establishing that summary judgment is appropriate, but summary judgment may be entered against the unresponsive non-movant. I.C. § 4-21.5-3-23(f).

5. In this enforcement case, IDEM has the burden of showing whether the IDEM’s determination that Jimmerson Bay is liable for civil penalties for unpermitted land disturbing activities and insufficient erosion and sediment control measures either complied with, or was contrary to law, as a matter of law. *In the matter of Objection to the Issuance of Permit Approval No. IN 0061042 Aquasource Services and Technology*, 2002 OEA 41 (“*Aquasource*”).

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6. OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Env'tl. Adjud.*, 811 N.E.2d 806, 809 (Ind. 2004)(appeal of OEA review of NPDES permit); *see also* I.C. § 4-21.5-3-27(d). While the parties disputed whether IDEM's determination of Jimmerson Bay's unpermitted soil movement and site control was proper, OEA is authorized "to make a determination from the affidavits . . . pleadings or evidence." I.C. § 4-21.5-3-23(b). "Standard of proof generally has been described as a continuum with levels ranging from a "preponderance of the evidence test" to a "beyond a reasonable doubt" test. The "clear and convincing evidence" test is the intermediate standard, although many varying descriptions may be associated with the definition of this intermediate test." *Matter of Moore*, 453 N.E.2d 971, 972, n. 2. (Ind. 1983). The "substantial evidence" standard requires a lower burden of proof than the preponderance test, yet more than the scintilla of the evidence test. *Burke v. City of Anderson*, 612 N.E.2d 559, 565, n.1 (Ind. Ct. App. 1993). *GasAmerica #47*, 2004 OEA 123, 129. *See also Blue River Valley*, 2005 OEA 1, 11-12. *Objection to the Denial of Excess Liability Trust Fund Claim Marathon Point Service, ELF # 9810570/FID #1054, New Castle, Henry County, Indiana; Winimac Service, ELF #9609539/FID #14748, Winimac, Pulaski County, Indiana; HydroTech Consulting and Engineering, Inc. (04-F-J-3338)*, 2005 OEA 26, 41.
7. Respondent's election to proceed without legal counsel after February 5, 2009 may not affect this Court's review of Respondent's case. "A litigant who chooses to proceed *pro se* will be held to the same rules of procedure as trained legal counsel and must be prepared to accept the consequences of his action." *Shepherd v. Truex*, 819 N.E.2d 457, 463 (Ind. Ct. App. 2004), *cited in Clay Township of Hamilton County, Indiana, by Judith F. Hagan, Clay Township Trustee, Petitioner; The Board of Trustees of the Clay Township Regional Waste District, Respondent; Board of Commissioners of Boone County and Town of Zionsville, Interveners; Indiana Department of Environmental Management, Respondent. (06-W-J-3660)*, 2007 OEA 8, 13.
8. Jimmerson Bay's January 9, 2007 Petition for Review objecting to IDEM's December 19, 2006 Commissioner's Order was filed in a timely manner. The issues for consideration concern whether the alleged unpermitted land disturbing activities and insufficient erosion and sediment control measures violated applicable laws; and if so, the appropriate amount of civil penalty to be assessed.
9. Per Ind. Tr. R 36, IDEM's Requests for Admission included in its Discovery Requests to Respondent were deemed admitted.

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10. Per 327 IAC 5-2-2, discharge of pollutants into waters of the state is prohibited, unless authorized as an exempted activity stated in 327 IAC 5-2-4, or unless authorized by a valid National Pollution Discharge Elimination System (“NPDES”) permit, issued prior to the discharge. 327 IAC 5-2-4 further states general NPDES permit rules for storm water from construction activity. Substantial evidence shows that Jimmerson Bay’s construction activity caused storm water discharge to the extent described in 327 IAC 5-2-4. No evidence was presented that any discharge by Jimmerson Bay conformed to exemptions stated in 327 IAC 5-2-4. Substantial evidence shows no genuine issue of material fact that, as a matter of law, Respondent Jimmerson Bay is subject to the requirements of 327 IAC 5-2, *et seq.*
11. Discharge of pollutants into waters of the state resulting from specified land disturbing activities, including storm water run-off associated with construction activity of one (1) acre or more, is regulated under 327 IAC 15-5, frequently referred to as “Rule 5”. A NPDES permit authorizes discharge from specified land disturbing activities. Depending upon the type and scope of land disturbing activity, a project may qualify for a general permit, or “permit by rule”; more extensive projects may require an individual permit. 327 IAC 15-1-1. Compliance with a general permit satisfies relevant federal and state law requirements. 327 IAC 15-2-7(a).
12. Substantial evidence shows no genuine issue of material fact exists, as a matter of law, that Respondent initiated land disturbing activities at the Site in excess of one acre and has failed to comply with the requirements stated in 327 IAC 15.
13. Substantial evidence shows no genuine issue of material fact that, as a matter of law, per 327 IAC 5-2-2, Respondent Jimmerson Bay was required to obtain either an individual or general NPDES permit prior to discharging any pollutants from the Site into the waters of the State.
14. Per 327 IAC 15-5-4(9), “‘Developer’ means:
 - (A) any person financially responsible for construction activity; or
 - (B) an owner of property who sells or leases, or offers for sale or lease, any lots in a subdivision.”
15. Per 327 IAC 15-5-4(29), “‘Project site’ means the entire area on which construction activity is to be performed.”
16. Per 327 IAC 15-5-4(30), “‘Project site owner’ means the person required to submit the NOI letter under this article and required to comply with the terms of this rule, including either of the following:
 - (A) A developer.

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- (B) A person who has financial and operational control of construction activities and project plans and specifications, including the ability to make modifications to those plans and specifications.”
17. Per 327 IAC 15-5-2(d), “The project site owner has the following responsibilities:
- (1) Complete a sufficient notice of intent (“NOI”) letter.
 - (2) Ensure that a sufficient construction plan is completed and submitted in accordance with section 6 of this rule.
 - (3) Ensure compliance with this rule during:
 - (A) the construction activity; and
 - (B) Implementation of the construction plan.
 - (4) Notify [IDEM] with a sufficient notice of termination letter.
 - (5) Ensure that all persons engaging in construction activity on a permitted project site comply with applicable requirements of this rule and the approved construction plan.”
18. Substantial evidence shows no genuine issue of material fact exists, as a matter of law, that Respondent Jimmerson Bay owned and operated the Site when the activity described in Commissioner’s Order occurred, when the Commissioner’s Order was issued and received in December, 2006, and remains the current project Site owner and operator. *Ex. A, pp. 4, 5.* Substantial evidence shows no genuine issue of material fact exists, as a matter of law, that Respondent is a “developer” and “project site owner” as defined in 327 IAC 15-5-4. *Id.* The record in this cause provides substantial evidence in support of Respondent’s admission that Respondent is subject to I.C. § 13, *et seq.*, and Title 327 of the Indiana Administrative Code. *Id.* The record in this cause provides substantial evidence to support Respondent’s admission that I.C. § 13, *et seq.* is applicable to the facts of this cause. By substantial evidence, no genuine issue of material fact exists, as a matter of law, that Respondent Jimmerson Bay is subject to the requirements stated in Title 327 and Rule 5, 327 IAC 15-5.
19. Per 327 IAC 15-2-5 and 327 IAC 15-5-6, any person subject to Rule 5 must submit a NOI letter to IDEM prior to commencing land-disturbing activities; the NOI must comply with 327 IAC 15-3 and 327 IAC 15-5-5. 327 IAC 15-2-5. By substantial evidence, no genuine issue of material fact exists, as a matter of law, that Jimmerson Bay’s failure to submit an NOI violated 327 IAC 15-2-5.

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20. 327 IAC 15-5-7 requires several erosion control measures to be met on all sites during the period when land-disturbing activities occur. The requirements include: detaining sediment-laden water from reaching streams, keeping sediment off roadways, protecting storm drains from sedimentation, protecting existing storm water drainage channels from the land-disturbing activities, and controlling soil run-off through appropriate erosion control measures. 327 IAC 15-5-7(b). IDEM presented substantial evidence of the lack of genuine issue of material fact, as a matter of law that Jimmerson Bay failed to satisfactorily implement and maintain erosion control measures. Jimmerson Bay has not provided evidence to the contrary. Inspection reports indicated that Jimmerson Bay's erosion control measures were unsatisfactory. *IDEM Exs. B, C*. Photographs show that Jimmerson Bay engaged in land-disturbing activities at the Site with insufficient erosion control measures. *Ex. D*. The reports indicate off-site sedimentation occurred into wetlands and a lake. The inspection reports, combined with photographs of the Site, provide substantial evidence that Jimmerson Bay's erosion control measures were unsatisfactory, and resulted in off-site sedimentation. As did Respondent in *IDEM v. Lee Wilder d/b/a Rockwood Development, 07-W-E-3892, ("Rockwood")*⁵, Jimmerson Bay offered no evidence to dispute that these violations occurred or that on the dates of the inspections, or that conditions at the Site were different than documented by IDEM. A nonmovant may not rest on his pleadings, but must set forth specific facts, using supported materials, which show the existence of a genuine issue for trial. *See Allstate Insurance Co. v. Bradtmueller, 715 N.E.2d 993 (Ind. App. 1999); see also I.C. § 4-21.5-3-23(f)*. Here, Jimmerson Bay's failure to implement erosion control measures provides substantial evidence that no genuine issue of material fact exists and that Jimmerson Bay violated 327 IAC 15-5-7 as a matter of law. IDEM's inspection reports showing Site sedimentation and erosion support Jimmerson Bay's admissions provide substantial evidence of the lack of genuine issue of material fact, as a matter of law, of Jimmerson Bay's failure to implement and maintain appropriate sediment and erosion controls, in violation of 327 IAC 15-5-7(b).
21. Per 327 IAC 15-5-8, a project site owner remains responsible for the project site until all land disturbing activities, including construction, are complete and the site has achieved "final stabilization".
22. Per 327 IAC 15-5-4(14), "Final Stabilization' means the establishment of permanent vegetative cover or the application of a permanent nonerosive material to areas where all land disturbing activities have been completed and no additional land disturbing activities are planned under the current permit."

⁵ 2008 OEA 40; see also January 26, 2009 Order, Cause No. 47D01-0805-PL-717 (Lawrence Superior Court 1), attached hereto and incorporated herein.

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23. Responsibility for compliance with Rule 5 is not transferred from the project site manager to the individual property owner or occupier until IDEM issues a verified Notice of Termination (“NOT”) letter. 327 IAC 15-5-8(e). Until IDEM issues a verified NOT letter, the project site owner remains responsible for ensuring that the individual lot owners or contractors comply with the approved construction plan so as to satisfy storm water runoff requirements stated in 327 IAC 15-5-7(b). No verified NOT letter was approved or issued for Respondent’s Site. By substantial evidence, no genuine issue of material fact exists, as a matter of law, that Respondent remains responsible for compliance with Rule 5 at the Site.
24. Minimum surface water quality conditions must be maintained, per 327 IAC 2-1-6(a):
- (1) All surface waters at all times and at all places, including waters within the mixing zone, shall meet the minimum conditions of being free from substances, materials, floating debris, oil or scum attributable to municipal, industrial, agricultural, and other land use practices, or other discharges that do any of the following:
 - (A) Will settle to form putrescent or otherwise objectionable deposits.
 - (B) Are in amounts sufficient to be unsightly or deleterious.
 - (C) Produce:
 - (i) color;
 - (ii) visible oil sheen;
 - (iii) odor; or
 - (iv) other conditions;in such degree as to create a nuisance.
 - (D) in concentrations or combinations that will cause or contribute to growth of aquatic plants or algae to such degree as to:
 - (i) create a nuisance;
 - (ii) be unsightly; or
 - (iii) otherwise impair the designated uses.
 - (E) Are in amounts sufficient to be acutely toxic to, or otherwise severely injure or kill, aquatic life, or other animals, plants, or humans . . .
25. As noted in Para. 20, above, IDEM inspection reports (IDEM Exs. B, C), combined with Site photographs (Ex. D.), provides substantial evidence that Jimmerson Bay’s land-disturbing activity and erosion control measures were unsatisfactory, and resulted in off-site sedimentation. The inspection reports indicated off-site sedimentation was deposited into surface waters: wetlands and a lake. The surface water deposits were visible and degraded high-quality wetlands. By substantial evidence, no genuine issue of material fact exists, as a matter of law, that Respondent Jimmerson Bay violated 327 IAC 2-1-6(a).

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26. I.C. § 13-30-2-1(1) provides, in pertinent part:

No person may discharge, emit, cause, allow, or threaten to discharge, emit, cause, or allow any contaminant or waste . . . either alone or in combination with contaminants from other sources, into the environment . . . in any form which causes or would cause pollution which violates or which would violate rules, standards, or discharge or emission requirements adopted by the appropriate board under the environmental management laws.

27. Respondent Jimmerson Bay's land-disturbing activities discharged off-site sedimentation into wetlands and waters of the state, in violation of Rule 5 of Indiana's environmental management laws. Consequently, as in *Rockwood*, Jimmerson Bay violated I.C. § 13-30-2-1(1). *Exs. B, C, D.* Therefore, no genuine issue of material fact exists; substantial evidence exists that Respondent violated I.C. § 13-30-2-1 as a matter of law.

28. Respondent Jimmerson Bay also violated I.C. § 13-18-4-5, which provides, in pertinent part:

It is unlawful for any person to throw, run, drain, or otherwise dispose into any of the streams or waters of Indiana; or cause, permit, or suffer to be thrown, run, drained, allowed to seep, or otherwise disposed into any waters; any organic or inorganic matter that causes or contributes to a polluted condition of any waters . . . as determined by rules adopted by the Water Pollution Control Board.

Due to construction activity documented in July 7, 2004, October 28, 2004, January 4, 2005, May 18, 2005, May 19, 2005, May 28, 2005, July 6, 2005 and September 18, 2006 (Section I); and in May 18, 2005, May 26, 2005, May 28, 2005 and July 6, 2005 and September 18, 2006 (Section II), *IDEM Exs. B, C, D.*, Jimmerson Bay caused and/or allowed sediment to enter waterways which contributed to polluted conditions in violation of I.C. § 13-18-4-5. As a matter of law, substantial evidence has been presented that no genuine issue of material fact exists, that Respondent Jimmerson Bay violated I.C. § 13-18-4-5.

29. As a matter of law, Jimmerson Bay is subject to civil penalties for violating Indiana's environmental management laws and water pollution control laws. "Any person who violates any provision of environmental management laws [or] water pollution control laws... is liable for a civil penalty not to exceed twenty-five thousand dollars (\$25,000) per day of any violation." I.C. § 13-30-4-1. As concluded above, Jimmerson Bay violated Indiana environmental management laws and water pollution control laws. Consequently, Jimmerson Bay is subject to civil penalties for these violations.

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30. The Commissioner's Order was issued to Jimmerson Bay for its failure to implement sediment and erosion control measures. To calculate the amount of civil penalty, IDEM used its Civil Penalty Policy Nonrule Policy Document⁶ when calculating the penalty of \$34,400 described in the Commissioner's Order. *Ex. K.* IDEM's civil penalty policy is a reasonable means of determining the civil penalty because it allows for predictable, consistent and fair calculation of penalties. *Commissioner, Ind. Dep't of Env't'l Mgmt. v. Carson Stripping, Inc. and Carson Laser, Inc.*, 2004 OEA 14, 26, citing *Ind. Dep't of Env't'l Mgmt. v. Schnippel Construction, Inc.*, 778 N.E.2d 407, 416 (Ind. Ct. App. 2002), *trans. den.* (affirming an administrative law judge's penalty calculation because the calculation was based on IDEM's written penalty policy). This penalty was based not only on Jimmerson Bay's deviation from the rule and the potential harm, but on the fact that the violations were documented over many inspections. *Id.* For four violations, IDEM determined a degree of deviation from the rule and the violation's potential for harm. Each of the four violations were assigned a penalty amount and were assigned five "violation days",⁷ accounting for the total \$34,400 penalty. *IDEM Ex. K, Civil Penalty Worksheet.* There is no issue of material fact as to whether the penalty exceeds the statutory maximum of \$25,000 per day or whether IDEM calculated it according to established IDEM policy. *Id.* However, the above analysis demonstrates a genuine issue of material fact as to the amount of penalty, to be calculated per the presiding Environmental Law Judge's *de novo* review. Therefore, a genuine issue of material fact exists as to the amount of civil penalty to be assessed, precluding issuance of summary judgment on the issue of civil penalty amount.
31. At the September 3, 2009 Final Prehearing Conference, the only attending party, IDEM, elected to present no further evidence to supplement the evidence offered to support its motion for summary judgment. Although Respondent Jimmerson Bay was served with scheduling orders, it last participated in this cause by its April 3, 2009 Motion for Extension. The record in this cause contains substantial evidence for the Court to apply the Civil Penalty Policy to determine the appropriate penalty in this matter. According to this policy, a civil penalty is calculated by "(1) determining a base civil penalty dependent on the severity and duration of the violation, (2) adjusting the penalty for special factors and circumstances, and (3) considering the economic benefit of noncompliance." The base civil penalty is calculated taking into account two factors: (1) the potential for harm and (2) the extent of deviation.

⁶ IDEM's Civil Penalty Policy is a non-rule document, ID No. Enforcement 99-0002-NPD, originally adopted on April 5, 1999 in accordance with Ind. Code § 13-14-1-11.5.

⁷ The violations were actually observed on nine different days. According to the Civil Penalty Policy Nonrule Policy Document, IDEM correlates the number of days the violations were observed to a corresponding "violation days" multiplier for the purposes of calculating a civil penalty. The resulting multiplier is typically less than the number of times the violations were actually observed.

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32. The policy states that the potential for harm may be determined by considering “the likelihood and degree of exposure of person or the environment to pollution” or “the degree of adverse effect of noncompliance on statutory or regulatory purposes or procedures for implementing the program.” There are several factors that may be considered in determining the likelihood of exposure. These are the toxicity and amount of the pollutant, the sensitivity of the human population or environment exposed to the pollutant, the amount of time exposure occurs, and the size of the violator.
33. For the violations of I.C. § 13-30-2-1(1), I.C. § 13-18-4-5 and 327 IAC 15-5-6, failure to submit an NOI, the potential for harm is minor. The lack of proper notice, in and of itself, creates no likelihood of exposure to harmful substances, but noncompliance with the requirement eliminates IDEM’s opportunity to advise against harm or prepare for response.
34. The second determination for the violations of I.C. § 13-30-2-1(1), I.C. § 13-18-4-5 and 327 IAC 15-5-6 is the extent of deviation. Failure to submit an NOI in this instance results in a minor extent of deviation.
35. According to the Civil Penalty Policy, a value is selected from a selected cell “is left to the judgment of enforcement staff and is based on the individual circumstances of each case.” On *de novo* review of a case before the OEA, such judgment is to be exercised by the presiding environmental law judge (“ELJ”), to determine the base penalty. In this case, the ELJ finds that the lowest end of the range for a Minor/Minor violation is appropriate, resulting in a penalty of One Thousand Dollars (\$1,000.00) per violation day. The violation of failing to submit an NOI occurred once, therefore one violation day is selected, for a base civil penalty of One Thousand Dollars (\$1,000.00). The base civil penalty value may be adjusted by aggravating or mitigating factors. The mitigating factor of “Quick Settlement” did not occur, as Respondent did not execute a settlement which it agreed to in mediation. Therefore, the ELJ finds either aggravating or mitigating factors to consider. No evidence quantified an economic benefit inuring to Respondent.
36. Respondent Jimmerson Bay is assessed a civil penalty of One Thousand Dollars (\$1,000.) for violations of I.C. § 13-30-2-1(1), I.C. § 13-18-4-5, as specified in 327 IAC 15-5-6.

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37. For the violations of I.C. § 13-30-2-1(1), I.C. § 13-18-4-5 and 327 IAC 15-5-7, failure to implement and maintain erosion control measures, the potential for harm is moderate. Failed erosion control measures resulted in release of storm water containing residential construction site runoff, presumed to be soil and debris customarily used in home construction. No evidence was presented that the deposited materials were toxic. The inspection reports and photographs demonstrate that a large amount of unpermitted discharge was deposited over a long period of time. A public road was affected. Erosion occurred to the environment, and runoff left deposits in a sensitive environment, a wetlands, and a lake. The regulatory purposes or procedures for implementing the program were disregarded, and resulted in extensive investigatory and litigation burden to the taxpayers via IDEM.
38. The second determination for the violations of I.C. § 13-30-2-1(1), I.C. § 13-18-4-5 and 327 IAC 15-5-7 is the extent of deviation. Failure to implement and maintain erosion control measures in this instance results in a moderate extent of deviation.
39. According to the Civil Penalty Policy, a value is selected from a selected cell “is left to the judgment of enforcement staff and is based on the individual circumstances of each case.” On *de novo* review of a case before the OEA, such judgment is to be exercised by the presiding environmental law judge (“ELJ”), to determine the base penalty. In this case, the ELJ finds that the lowest end of the range for a Moderate/Moderate violation is appropriate, resulting in a penalty of Seven Thousand Five Hundred Dollars (\$7,500.00) per violation day. The violation of failing to implement and maintain erosion control measures occurred on two sites, Sections I and II, therefore two violation days are selected, for a base civil penalty of Fifteen Thousand Dollars (\$15,000.00). The base civil penalty value may be adjusted by aggravating or mitigating factors. The mitigating factor of “Quick Settlement” did not occur, as Respondent did not execute a settlement it agreed to in mediation. Therefore, the ELJ finds neither aggravating or mitigating factors to consider. No evidence quantified an economic benefit inuring to Respondent.
40. Respondent Jimmerson Bay is assessed a civil penalty of Fifteen Thousand Dollars (\$15,000.) for violations of I.C. § 13-30-2-1(1), I.C. § 13-18-4-5, as specified in 327 IAC 15-5-7.
41. For the violations of I.C. § 13-30-2-1(1), I.C. § 13-18-4-5 and 327 IAC 5-5-2, discharging without a permit, the potential for harm is moderate. The violation of failing to obtain a permit occurred once, therefore one violation day is selected. However, the regulatory purposes or procedures for implementing the program were disregarded, and resulted in extensive investigatory and litigation burden to the taxpayers via IDEM.
42. The second determination for the violations of I.C. § 13-30-2-1(1), I.C. § 13-18-4-5 and 327 IAC 5-5-2 is the extent of deviation. Failing to obtain a permit for discharge in this instance results in a minor extent of deviation.

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43. According to the Civil Penalty Policy, a value is selected from a selected cell “is left to the judgment of enforcement staff and is based on the individual circumstances of each case.” On *de novo* review of a case before the OEA, such judgment is to be exercised by the presiding environmental law judge (“ELJ”), to determine the base penalty. In this case, the ELJ finds that the midrange for a Moderate/Minor violation is appropriate, resulting in a penalty of Two Thousand Dollars (\$2,000.00) per violation day. The violation of discharging without a permit, as in the case of failure to submit an NOI, occurred once, therefore one violation day is selected, for a base civil penalty of Two Thousand Dollars (\$2,000.00). The base civil penalty value may be adjusted by aggravating or mitigating factors. The mitigating factor of “Quick Settlement” did not occur, as Respondent did not execute a settlement it agreed to in mediation. Therefore, the ELJ finds neither aggravating or mitigating factors to consider. No evidence quantified an economic benefit inuring to Respondent.
44. Respondent Jimmerson Bay is assessed a civil penalty of Two Thousand Dollars (\$2,000.) for violations of I.C. § 13-30-2-1(1), I. C. § 13-18-4-5, as specified in 327 IAC 5-5-27.
45. For the violations of I.C. § 13-30-2-1(1), I.C. § 13-18-4-5 and 327 IAC 2-1-6, releasing unpermitted discharge into the waters of the State, the potential for harm is major. The unpermitted discharge resulted in release of storm water containing residential construction site runoff, presumed to be soil and debris customarily used in home construction. No evidence was presented that the deposited materials were toxic. The inspection reports and photographs demonstrate that a large amount of unpermitted discharge was deposited over a long period of time. A public road was affected. Erosion occurred to the environment, and runoff left deposits in a sensitive environment, a wetlands, and a lake. The regulatory purposes or procedures for implementing the program were disregarded, and resulted in extensive investigatory and litigation burden to the taxpayers via IDEM. The impact to wetlands and waters of the State were significant.
46. The second determination for the violations of I.C. § 13-30-2-1(1), I.C. § 13-18-4-5 and 327 IAC 2-1-6 is the extent of deviation. Release of unpermitted discharge into the waters of the State in this instance results in a major extent of deviation.

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47. According to the Civil Penalty Policy, a value is selected from a selected cell “is left to the judgment of enforcement staff and is based on the individual circumstances of each case.” On *de novo* review of a case before the OEA, such judgment is to be exercised by the presiding environmental law judge (“ELJ”), to determine the base penalty. In this case, the ELJ finds that the low end of the range for a Major/Major violation is appropriate, resulting in a penalty of Twenty Thousand Dollars (\$20,000.00) per violation day. The violation of discharging into waters of the State was documented as unsatisfactory, or photographs showed off-site discharge, in May, 2005, July 2005, and September, 2006. Three violation days are selected, for a base civil penalty of Sixty Thousand Dollars (\$60,000.00). The base civil penalty value may be adjusted by aggravating or mitigating factors. The mitigating factor of “Quick Settlement” did not occur, as Respondent did not execute a settlement it agreed to in mediation. Therefore, the ELJ finds neither aggravating or mitigating factors to consider. No evidence quantified an economic benefit inuring to Respondent.
48. Respondent Jimmerson Bay is assessed a civil penalty of Sixty Thousand Dollars (\$60,000.) for violations of I.C. § 13-30-2-1(1), I.C. § 13-18-4-5, as specified in 327 IAC 2-1-6.
49. Respondent Jimmerson Bay is assessed a total civil penalty of Seventy-Eight Thousand Dollars (\$78,000) for the violations of I.C. § 13-30-2-1(1), I.C. § 13-18-4-5, 327 IAC 15-5-6, 327 IAC 15-5-7, 327 IAC 5-2-2 and 327 IAC 2-1-6, and the December 19, 2006 Commissioner’s Order is sustained.

FINAL ORDER

For all of the foregoing reasons, **IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that the Respondent, Jimmerson Bay Developers, LLC, violated I.C. § 13-30-2-1(1), I.C. § 13-18-4-5, 327 IAC 15-5-6, 327 IAC 15-5-7, 327 IAC 5-2-2 and 327 IAC 2-1-6.

1. Complainant, Indiana Department of Environmental Management’s Motion for Summary Judgment is **GRANTED**, on the issues that Jimmerson Bay Developers, LLC that Jimmerson Bay is subject to civil penalties for violating Indiana’s environmental management laws and water pollution control laws.
2. Complainant, Indiana Department of Environmental Management’s Motion for Summary Judgment is **DENIED**, on the issue that the civil penalty assessed by the Indiana Department of Environmental Management is correct, as a matter of law.
3. Respondent, Jimmerson Bay Developers, LLC, is subject to civil penalties of Seventy-Eight Thousand Dollars (\$78,000) for violating Indiana’s environmental management laws and water pollution control laws.

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4. Except for the amount of civil penalty, the Indiana Department of Environmental Management's December 19, 2006 Commissioner's Order is **AFFIRMED**.

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

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

IT IS SO ORDERED in Indianapolis, Indiana this 5th day of April, 2010.

Hon. Mary L. Davidsen
Chief Environmental Law Judge