

Commissioner, Indiana Department of Environmental Management, Complainant

v.

Ronnie Scherb d/b/a Scherb Dairy, Respondent
2006 OEA 16 (05-S-E-3561)

TOPICS:

Enforcement
spill rule
manure
burden of proof
penalty policy
penalty
corrective action
confined animal feeding operation

PRESIDING JUDGE:

Gibbs

PARTY REPRESENTATIVES:

Complainant: Nicole Lyn Sipe, IDEM
Respondent: Ronnie Scherb, *pro se*

ORDER ISSUED:

July 19, 2006

INDEX CATEGORY:

Water
Enforcement

FURTHER CASE ACTIVITY:

[none]

Commissioner, Indiana Department of Environmental Management, Complainant

v.

**Ronnie Scherb d/b/a Scherb Dairy, Respondent
2006 OEA 16 (05-S-E-3561)**

6. On January 19, 2006, counsel for Respondent filed his Notice of Withdrawal of Counsel and Scherb's Motion for Extension. On January 26, 2006, this Environmental Law Judge (the "ELJ") granted counsel's request to withdraw and granted the Respondent an extension until February 7, 2006 to answer IDEM's discovery requests.
7. The Respondent did not answer the discovery requests.
8. On February 22, 2006, IDEM filed its Motion for Proposed Order of Dismissal and Suspension of Dispositive Motion Deadline. On February 24, 2006, this ELJ granted the motion for extension of time to file dispositive motions and ordered the Respondent to answer the IDEM's discovery requests within ten (10) business days of the receipt of the order. The IDEM's Requests for Admission were deemed admitted.
9. The Respondent failed to respond to the discovery requests.
10. On March 15, 2006, IDEM filed its Renewed Motion for Proposed Order of Dismissal.
11. On March 17, 2006, this ELJ issued its Notice of Proposed Order of Default to the Respondent allowing him seven (7) days from service of the Notice to respond or be held in default. The Respondent failed to respond.
12. On March 31, 2006, the Notice of Proposed Order of Default was re-issued by certified mail, return receipt requested. The Respondent received the notice on April 3, 2006.
13. On April 19, 2006, counsel for the IDEM filed its Request for Entry of Order of Dismissal or, in the Alternative, Motion for Suspension of Dispositive Motion Deadline.
14. On April 19, 2006, this ELJ issued its Order of Default and for Status Conference (April 19, 2006 Order). The Respondent was held in default and found to be in violation of the regulations specified in the CO. The amount of penalty and corrective actions were unresolved.
15. On April 26, 2006, the IDEM filed its Motion to Reconsider the April 19, 2006 Order of Default and for Status Conference.
16. A status conference was held on May 5, 2006 with the Respondent present and counsel for IDEM participating by telephone. The remaining issues were set for hearing on June 14, 2006.
17. On May 22, 2006, the IDEM filed another Motion to Reconsider.
18. On June 14, 2006, a hearing was held. The IDEM presented evidence regarding the amount of the penalty and the corrective actions that the Respondent needed to undertake.

Commissioner, Indiana Department of Environmental Management, Complainant

v.

**Ronnie Scherb d/b/a Scherb Dairy, Respondent
2006 OEA 16 (05-S-E-3561)**

19. IDEM's Request for Admission #38 states "The civil penalty of \$10,000 set out in the Notice and Order is not arbitrary and capricious." Exhibit IDEM #3.
20. The civil penalty in this matter was calculated in accordance with the Civil Penalty Policy. This policy was published by the IDEM under IND. CODE § 13-14-1-11.5. IDEM's Civil Penalty Policy is a nonrule policy document, ID No. Enforcement 99-0002-NPD, originally adopted on April 5, 1999.
21. There are no aggravating or mitigating factors to consider in this matter nor did the Respondent receive any economic benefit.
22. The Respondent continues to operate a small animal feeding operation.

Conclusions of Law

1. The Office of Environmental Adjudication ("OEA") has jurisdiction over the decisions of the Commissioner of the IDEM and the parties to the controversy pursuant to IC 4-21.5-7-3.
2. This office 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). Findings of fact must be based exclusively on the evidence presented to the ELJ, and deference to the agency's initial factual determination is not allowed. *Id.*; I.C. 4-21.5-3-27(d). "*De novo* review" means that:

all 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).

3. The IDEM has filed two Motions to Reconsider this ELJ's April 19, 2006 Order finding the Respondent in default as to the violations, but not as to the civil penalty or the corrective actions. The IDEM complains that the ELJ has improperly placed the burden of proof on the IDEM and that, the Respondent, as the person who initiated this appeal, should have the burden of proof. However, it is apparent from the statutes that the IDEM, as the complainant, has the burden in this case. IND. CODE § 13-3-3-9 states "In hearings under this chapter, the burden is on the complainant to show the alleged violation."

Commissioner, Indiana Department of Environmental Management, Complainant

v.

Ronnie Scherb d/b/a Scherb Dairy, Respondent
2006 OEA 16 (05-S-E-3561)

4. In addition, IDEM complains that this ELJ was incorrect in not finding in IDEM's favor on all issues. However, it is clear that, under the trial rules, it is proper to enter a limited order as a sanction for failure to respond to discovery.¹ Indiana Rules of Trial Procedure, Rule 37(B)(2) lists the possible sanctions:

- (2) *Sanctions by court in which action is pending.* If a party or an officer, director, or managing agent of a party or an organization, including a governmental organization, or a person designated under Rule 30(B)(6) or 31(A) to testify on behalf of a party or an organization, including a governmental organization, fails to obey an order to provide or permit discovery, including an order made under subdivision (A) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
- (a) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
 - (b) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;
 - (c) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
 - (d) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination under Rule 35;
 - (e) Where a party has failed to comply with an order under Rule 35(A) requiring him to produce another for examination, such orders as are listed in paragraphs (a), (b), and (c) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination. In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

In accordance with IND. CODE § 4-21.5-3-22, 315 IAC 1-3-1(b)(18) and Indiana Trial Rule 37(B)(2), it was within the ELJ's discretion to issue this order. The April 19, 2006 Order issued by this ELJ is affirmed and IDEM's Motions to Reconsider are **DENIED**.

¹ Pursuant to 315 IAC 1-3-1(b)(18), this Court may apply the Indiana Rules of Trial Procedure.

Commissioner, Indiana Department of Environmental Management, Complainant

v.

**Ronnie Scherb d/b/a Scherb Dairy, Respondent
2006 OEA 16 (05-S-E-3561)**

5. The IDEM used the Civil Penalty Policy² 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. The policy states that the potential for harm may be 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”. 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.
7. The Requests for Admissions establish that as a result of the Respondent’s activities, liquid animal manure ran into a tributary to Little Birch Creek from the farm field used by the Respondent for land application (Request for Admission #19) and that dead minnows were observed in this tributary on the same date and place as the manure spill (Request for Admission #25).
8. The policy also considers the extent of deviation from the rule. In this instance, the Respondent admits that he did not incorporate the manure into the soil even though he believed that it was going to rain on that date and that, in fact, it did rain (Request for Admissions #13 and #15). The Respondent also admits that he took no action to contact IDEM to report the spill (Requests for Admissions #20, 21 and 22) or to mitigate the spill until IDEM personnel appeared (Request for Admissions #26, 27, 28 and 29). He also admits that he did not have a permit authorizing the discharge of manure from the farm field (Request for Admissions #31, 32, 33, 34 and 35).
9. The ELJ concludes that the potential for harm and the extent of deviation should both be classified as moderate.
10. The ELJ finds that there were no aggravating or mitigating factors to consider and that the Respondent received no economic benefit. Therefore, the appropriate penalty is the lowest amount in the penalty matrix for a moderate/moderate violation. The Respondent is assessed a penalty of seven thousand and five hundred dollars (\$7,500).

² IDEM’s Civil Penalty Policy is a nonrule policy document, ID No. Enforcement 99-0002-NPD, originally adopted on April 5, 1999 in accordance with IC 13-14-1-11.5.

Commissioner, Indiana Department of Environmental Management, Complainant

v.

**Ronnie Scherb d/b/a Scherb Dairy, Respondent
2006 OEA 16 (05-S-E-3561)**

11. Pursuant to 327 IAC 16-2-5, a confined animal feeding operation is defined as including an animal feeding operation that causes a violation of the water pollution control laws or regulations. As a confined animal feeding operation, Scherb's operation must have approval to operate (327 IAC 16-4-1) and must have an emergency spill response plan (327 IAC 16-9-4).

Final Order

AND THE COURT, being duly advised, hereby **ORDERS, ADJUDGES AND DECREES** that the Complainant has met its burden of proof in this matter.

1. The Respondent is **ORDERED** to pay a civil penalty of \$7,500 dollars to the IDEM. This penalty shall be remitted to the IDEM within thirty (30) days of the Respondent's receipt of this Order. Checks shall be made payable to the Environmental Management Special Fund, with the Cause Number indicated on the check and mailed to:

IDEM
Cashier-Mail Code 50-10C
100 N. Senate Ave.
Indianapolis, IN 46204-2251

2. Within thirty (30) days of his receipt of this Order, the Respondent shall submit a Spill Response Plan of the Site in accordance with 327 IAC 16-9-4 of the Confined Feeding Operations Rule.
3. Within thirty (30) days of receipt of this Order, the Respondent shall submit a complete Confined Feeding Operation approval application for all confined feeding activities at the Site in accordance with 327 IAC 16-4-1 et seq. of the Confined Feeding Operations Rule. This Approval Application shall be sent to:

Indiana Department of Environmental Management
Office of Land Quality – Mail Code MC 65-45, IGCN 1101
Jerome Rud
100 N. Senate Ave.
Indianapolis, IN 46206-6015

Commissioner, Indiana Department of Environmental Management, Complainant

v.

**Ronnie Scherb d/b/a Scherb Dairy, Respondent
2006 OEA 16 (05-S-E-3561)**

You are hereby further notified that pursuant to provisions of IND. CODE § 4-21.5-7.5, the Office of Environmental Adjudication serves as the Ultimate Authority in the administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is a Final Order subject to Judicial Review consistent with applicable provisions of IC 4-21.5. Pursuant to IC 4-21.5-5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

IT IS SO ORDERED THIS 19th day of July, 2006.

Hon. Catherine Gibbs
Environmental Law Judge