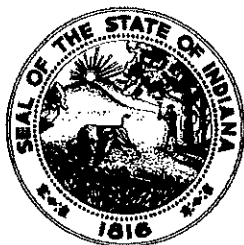


**OBJECTION TO THE ISSUANCE OF  
COMMISSIONER, INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT  
CASE NO. 2018-25086-Q  
BANKVIEW FARM, II, INC.  
2023 OEA 113, OEA CAUSE NO.: 18-W-J-5036**

<b>Official Short Cite Name:</b>	<b>Bankview Farm, 2023 OEA 113</b>
<b>OEA Cause No.:</b>	18-W-J -5036
<b>Topics/Keywords:</b>	Wetland forested Deposit Clearing agricultural Permit Farm Service Agency Highly Erodible Land and Wetland Conservation Determination Natural Resource Conservation Service; NRCS United States Army Corps of Engineers: USACE Not Inventoried; NI USACE-established Wetlands Delineation Form Data Form 1 Data Form 3 1987 USACE Delineation Manual 2010 Midwest Regional Supplement to the 1987 Manual's instructions Determination Delineation Wetlands indicators Hydric soils Mapped soils were Pewamo Hydrotrophic vegetation Hydrology Swamps Marshes Bogs Data point Mapped soils Pewamo Unpromulgated rule Vague; void Notice of Violation; NOV

	Commissioner's Order; CO
	Civil penalty
	Potential for harm
	Extent of deviation
	Restoration
	mitigation
	After-the-fact permit; ATF
	Burden of Proof
	I.C. § 13-11-2-25.8(b)
	I.C. § 13-11-2-265.6
	I.C. §13-11-2-265.7
	I.C. § 13-11-2-265.8
	I.C. § 13-14-1-11.5
	I.C. § 13-18, et seq.
	I.C. § 13-18-22-1(c)
	I.C. § 13-30-2-1
	I.C. § 13-30-3-9
	I.C. § 13-30-4-1
	327 IAC 2-1-6(a)(1)
	327 IAC 17-1, et seq.
	Boucher v. United States Dep't of Agriculture, 934 F.3d 530 (7th Cir. 2019).
<b>Presiding ELJ:</b>	MARY DAVIDSEN, ESQ.
<b>Party Representatives:</b>	CHRISTOPHER BAYH, ESQ., RESPONDENT/PETITIONER
	MARK J. CRANDLEY, ESQ., RESPONDENT/PETITIONER
	SUSANNA BINGMAN, ESQ., COMPLAINANT/RESPONDENT
<b>Order Issued:</b>	JUNE 30, 2023
<b>Index Category:</b>	ENFORCEMENT
<b>Further Case Activity:</b>	Judicial Review, Grant County (27C01-2307-MI-000067), overturned.  Court of Appeals (25A-MI-01011) re fees.



# INDIANA OFFICE OF ENVIRONMENTAL ADJUDICATION

Mary L. Davidsen, *Chief Environmental Law Judge*  
 Lori Kyle Endris, *Environmental Law Judge*  
 Sara C. Blainbridge, *Legal Administrator*

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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-J-5036

COMMISSIONER, INDIANA DEPARTMENT OF )  
 ENVIRONMENTAL MANAGEMENT, )  
 Case No. 2018-25086-Q, )  
 Complainant, )  
 )  
 v. )  
 )  
 BANKVIEW FARM, II, INC. )  
 MARION, GRANT COUNTY, INDIANA. )  
 Petitioner/Commissioner's Order Respondent. )

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

This matter came before the Office of Environmental Adjudication ("OEA" or "Court"), by legal counsel, on the May 6, 2022 Final Hearing on Respondent Bankview Farms II, Inc.'s December 11, 2018 Petition for Adjudicatory Hearing and Administrative Review, amended December 18, 2018 and February 13, 2019, on the November 28, 2018 Notice and Order of the Commissioner of the Indiana Department of Environmental Management. In sum, the Indiana Department of Environmental Management sought enforcement for alleged unpermitted regulated wetland clearing, deposits and agricultural activity on a farm near Marion, Grant 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 Bankview Farm II, Inc. The Chief ELJ, by substantial evidence, and being duly advised, now makes the following findings of fact and conclusions of law and enters the following order as to the existence and extent of wetlands subject to IDEM regulation.

## FINDINGS OF FACT

1. At issue is whether an alleged wetland is subject to enforcement for unpermitted regulated wetland clearing, deposits and agricultural activity discovered in November 2015, on

approximately 23 acres of 240-acre Farm #5343, Tract #9252, located at North County Road 900, Van Buren, near Marion, Grant County, Indiana ("Site"), owned by Bankview Farm II, Inc. ("Bankview"). Respondent Bankview's Petition for Adjudicatory Hearing and Administrative Review ("Petition"), p. 1; See Designation of Evidence in Support of Bankview Farm II, Inc.'s Motion for Summary Judgment ("Bankview Summary Judgment Evidence"), Ex F., attached Ex. A. The Site includes a forested area, approximately 23 contiguous acres. Notice and Order of the Commissioner of the Indiana Department of Environmental Management for Case No. 2018-25086-Q ("Commissioner's Order") Petition, Attachment 1, p. 2. Edward Blinn, Sr. ("Blinn") is Bankview's President. Petition, p. 2.

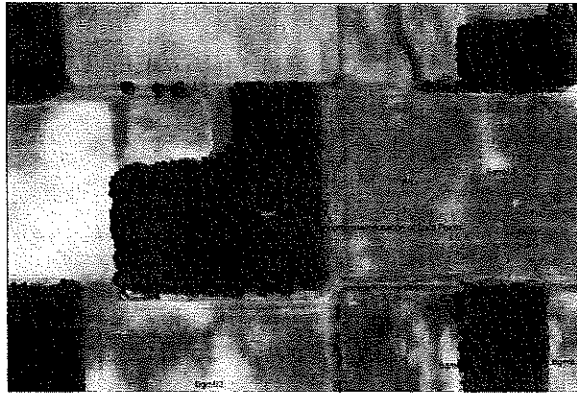
2. On September 1, 2004, the Grant County Farm Service Agency transmitted a June 22, 2004 Highly Erodible Land and Wetland Conservation Determination ("NRCS Determination"). Bankview Summary Judgment Evidence, Ex. F, September 30, 2018 Blinn Aff., attached Ex. A. The NRCS Determination specified parcel areas of the Site as containing some wetland areas but lists most of the specific site as non-inventoried, or NI. *Id.* Attached "Definitions of Wetland Label Codes" define NI as "Not Inventoried – no wetland determination has been completed." *Id.* Mr. Blinn interpreted the NRCS Delineation to mean that the Site "was not identified as wetlands by the NRCS. I used this NRCS report to determine where additional farming could take place" and where he could clear areas of the farm. Bankview Summary Judgment Evidence, Ex., F, p. 2, ¶¶ 11 -17. By 2015, Mr. Blinn had cleared the Site. *Id.*

3. Mr. Blinn determined that the Site was not a regulated wetland. Mr. Blinn made this determination from his own decades-long work on the Site, and by interpreting NI as not a wetland. He also stated that his conclusion that the Site was not a wetland was informed by his evaluation of the National Wetlands Inventory map, the National Resources Conservation Services ("NRCS") map, spoke with a NRCS representative, and people from the local community. . Hr'g Tr. 239:14 – 241:11; see Hr'g. Ex. 5, 13, 14.

4. In 2015, Indiana Department of Environmental Management ("IDEM") then-Senior Wetlands Project Manager Heather Parsons ("Parsons") was contacted by a United States Army, Corps of Engineers ("USACE") Project Manager, concerning an anonymous complaint received by the Grant County Farm Service Agency, that a wetland area was likely being cleared for farming activity. Hr'g Tr. 20:20-23, 21:1-18. In evaluating the Site, Parsons applied IDEM's inspection process, *Id.*, 26:23 - 27:11, wetland delineation training from at least two USACE training courses, *Id.*, p. 35 – 36:1, and her experience from having conducted at least 300 wetland inspections in seven years as an IDEM Project Manager. *Id.*, p. 28:1-5.

5. Aerial Site views show pre-disturbance conditions (left, with leaves on trees), and post-disturbance (right). *Bankview Summary Judgment Evidence*, Ex. 1, p. 3,4 (compiled).

Bankview Farms II-Pre-impact



Bankview Farms II-Post-Impact



6. On November 16, 2015, Parsons, along with another USACE Project Manager, Sarah Keller ("Keller"), began to inspect the area referenced by Grant County Farm Services. "From the road, we could see that there was mechanical land clearing going on using an excavator, clearing -- pushing of trees down and then moving them around the site, and clearing the ground." Parsons, *Hr'g Tr.* p. 22:11-1. Parsons and Keller entered the Site. When Parsons began digging a wetlands determination data point, Blinn noticed strangers on the property, became angry and ordered them to leave the farm. *Petition*, p. 3; *Bankview Summary Judgment Evidence*, Ex. F, Blinn Aff., p. 3, ¶ 19-21.

7. As the Site had been disturbed through clearing, it was considered an atypical site for wetlands determination purposes. Wetland criteria for atypical or disturbed sites thus only requires the presence of two of the three wetlands criteria: hydric soils, hydrotophic plants, and hydrology. *Hr'g Tr.*, p. 38:8-13.

8. Based on observations from the November 16, 2015 Site visit, IDEM's Parsons concluded that the Site had sufficient wetlands indicators, thus requiring a further desktop review of available Site documentation. Mapped soils, depressions identified on topographical maps, and various years of aerial imagery showed potential indicators of hydrology, to the extent that further investigation was necessary. *Hr'g Tr.* 24: 1 – 9; see *Section 401 Certification and State Regulated Wetland Assessment/Inspection ("Wetland Determination Forms")*, Ex. 1, p. 5. Land discoloration showed on the aerial imagery where trees were without leaf, which typically indicates hydrology; the Grant County GIS website showed water on the Site. *Hr'g Tr.* 24:15-19. Topographical map elevation contours showed an "odd shape in the area", which was a depressional area. *Id.*, 24:19 – 25:1. Mapped soils were Pewamo, one of the most common soils found in Indiana wetlands and are typically hydric and do not drain well to be useful unless a lot of drainage is installed. *Id.*, 25:2 - 8. Based upon the results of Parsons' desktop review, IDEM conducted a subsequent on-site investigation to determine whether the Site contained sufficient indicators of hydrotophic vegetation, hydric soils, and hydrology, so as to qualify as a wetland.

9. The USACE did not participate further with the Site, deciding that the Site was an isolated wetland subject to state, not federal regulation. *Hr'g Tr.* p. 26:4-19.

10. On January 6, 2016, IDEM, by Parsons, continued with Site investigation, accompanied by two Indiana Conservation Officers and by Bankview's Blinn. *Hr'g Tr.*, p. 25:10-23. Two data points were evaluated, and were approximately six feet apart. *Id.*, 29:1-7. A review of Site and area photographs and witness testimony show that the datapoints were representative of the Site. Given the Site's topography, plant growth, and size, she was able to view the characteristics of the entire Site. The points were near the depressional area depicted on the topographical map and where hydrology appeared on the aerial images. *Id.*, 33:8-10. The first data point ("DP1") had been previously forested and was mechanically cleared. *Id.*, 29:1-7. The second point ("DP2") had not been manipulated as recently as the first, so it could serve as a more accurate reference point for pre-disturbance Site conditions. *Id.* At each data point, Parsons dug sixteen-inch holes, *Id.* 33:13-21, and stated that she followed IDEM's standard inspection process, *supra*, utilizing the USACE-established Wetlands Delineation Form and the 1987 USACE Delineation Manual ("Manual"; also referencing the 2010 Midwest Regional Supplement to the 1987 Manual's instructions) *Id.*, 35:14-16. *See Manual*, Hr'g Ex. 11.

11. The data Parsons recorded was noted on a regional version of standard Data Form 1. *Hr'g Ex. 10*; see *Hr'g Ex. 1*, p. 5-8 for data forms used by Parsons and the regional versions of Data Form 1, *Hr'g Ex. 8*, Manual, appendix pp. B4 – B5, B- B8. She did not use Data Form 3, to be used for atypical sites, as is present in this case. *Id.*, p. B6, B9. Thus, "portions of Data Form 3 required inspection and notation of "Previous Vegetation", to "Attach documentation" of that vegetation, and to consider the "Type of Alteration" and the "Effect on Vegetation". The record does not contain this information.

12. Hydrotrophic plants characteristic of wetlands were identified at the Site at DP2, not DP1. *See Hr'g Tr.* p. 53:7-8. At DP1, some roots were present, but the species was not identifiable. *Hr'g Tr.* 34:5-8. The Site was cleared to the extent that pre-disturbance vegetation populations could not be determined. *Id.*, 38:3-5. Parsons took photos of dead tree piles, see *Id.*, 39:15 – 40:4; Ex. 1, p. 18, 20. She did not evaluate the trees further because it was not possible to confirm that the dead trees had been taken from the location of either data point. *Hr'g Tr.* 40:10. Both data points could have similar vegetative species, but the species could not be determined at DP1. *Id.*, 55:11-14. At DP2, identifiable plants were present within the data point radius. *Id.*, 49:20-22. The sapling/shrub stratum had a 20% absolute coverage percentage of red osier dogwood and 25% of green ash saplings, *Id.*, 49:1-22. Both species are facultative wetland species, or FACW, and commonly found in wetlands. *Id.*, 50:1-3. The herb stratum had a 20% dominance each of tall fescue and sedges, and 10% of Bidens, sometimes called beggersstaff. *Id.*, 50:4:22. While tall fescue is more of an upland plant, or FACUp, sedges and Bidens are FACW. *Id.* The species dominance test calculations were used to calculate a prevalence index of 2.47. *Id.*, p. 52 – p. 53:1-6. A prevalence index of less than or equal to 3 is an indicator of hydrotrophic vegetation.

13. Hydric soils characteristic of wetlands were present at the Site. Per the Manual, at least one indicator of hydric soils is required for a wetland delineation. *Id.*, 43:8-9, 10-12. Parsons

utilized a soil color profile to assist with soil profile identification. *Id.*, 40:16 – 41:16. DP1 had hydric soil type Depleted Below Dark Surface. *Id.*, 42:5. “[T]he soil goes from very dark, to having dark coloration, and then a brighter, almost orangish-yellowish coloration, which indicates that the water is moving through the soil enough to change the amount of oxygen within the soil column.” *Id.*, 42:9-14. The second hydric soil indicator was Redox Dark Surface, which has characteristics below six inches of depth specified in the Manual. *Id.*, 42:17. DP2 had hydric soil. *Id.*, 54:4-6.

14. Hydrology characteristic of wetlands was present at the Site. One primary indicator for hydrology or two secondary indicators are required for a wetland delineation. *Id.*, 44:1-4.

15. Datapoint one (“DP1”) demonstrated hydrology wetland indicators. *Hr’g Tr.* 47:17-22. Four primary indicators were present: a high water table (the pit Parsons dug filled before the investigation finished) *Id.*, 44:7-10; saturation (soil appears glossy, shimmers in light) *Id.*, 44:13-17; inundation is visible on aerial imagery (the Site’s aerial imagery showed standing water) *Id.*, 44:19:23; and oxidized rhizospheres on living roots (“As the root’s situated within the soil, you will see the root in the soil, and then surrounding that root you will see this orangish discoloration, and that’s the oxidation.”). *Id.*, 45:3-8. DP1 also had two secondary indicators: saturation visible on aerial imagery, *Id.*, 45:11-15, and geomorphic position (the area is in a depression confirmed on a topographical map), *Id.*, 45:16-22. Wetland hydrology is also derived from evaluation of photographic evidence, *Hr’g Ex. 1*, p. 4, p. 12; *Hr’g Tr.*, 46:4-6, 47:17:22. DP1 demonstrated wetland indicators. *Hr’g Tr.* 47:17:22.

16. DP2 demonstrated wetland hydrology indicators. Three primary indicators were detected: high water table, algal mat or crust, and oxidized rhizospheres. Two secondary indicators detected were saturation visible on aerial imagery and geomorphic position. *See Id.*, 54:9 to 55:10.

17. Both datapoints show a sufficient number of wetland indicators for hydric soils and hydrology. *See BV Ex. 1*, photo exhibits 18 through 23, *Id.*, 55:16 – 58:11. Hydrotrrophic vegetation was sufficiently indicated on DP2, not on DP1.

18. IDEM’s determination can become part of a larger record, a wetland delineation, which determines the extent of the wetland and its boundaries. IDEM requires the delineation to be conducted by the landowner. On summary judgment and in post-hearing briefing, Bankview challenged IDEM’s requirement that the landowner/regulator community conduct the wetlands delineation, as an impermissible, unpromulgated rule.

19. Bankview engaged consultants who performed a Site Wetland Delineation. *See Bankview Summary Judgment Evidence*, *Ex. 1*, p. 46 and following. Per the Court’s December 31, 2020 Order on Motion for Protective Order, the Wetland Delineation performed for Bankview was excluded from evidence.

20. IDEM’s May 1, 2018 Notice of Violation (“NOV”), *Stip. Ex. 1*, *BV pp.* 24 -35, specified the following violations:

- a. Discharge of dredged or fill material into a State Regulated Wetland observed during a January 6, 2016 Site inspection. “Specifically, the IDEM representative observed and documented the mechanical clearing of a 23-acre, Class II Isolated Forested Wetland, as defined by IC 13-11-2-25.8(a)(2) and IC 13-11-2-221.5 and the movement of fill using heavy machinery from a portion of the wetland area to another, resulting in objectionable deposits, which degraded the water quality and interfered with the existing and potential uses of the wetland at the Site”, in violation of 327 IAC 2-1-6(a)(1), I.C. § 13-30-2-1, and I.C. § 13-18-4-5. *Id.* BV 27.
- b. Failing to obtain a permit before clearing and grading a forested wetland, in violation of I.C. § 13-18-22-1, 327 IAC 17-2-3, 327 17-4-1, 327 17-4-3-1, *Id.*, BV p. 27, ¶ 3¶.

21. The November 28, 2018 Notice and Order of the Commissioner of the Indiana Department of Environmental Management (“Commissioner’s Order”) alleged the same violations stated in the November *Bankview Petition for Administrative Hearing and Administrative Review*, Attachment 1. The Commissioner’s Order required Respondent to obtain an after-the-fact (“ATF”) permit, or to restore the Site by returning to pre-disturbance contours and vegetive conditions. *Id.* at Order, ¶ 3.

- a. If the Respondent decides to restore the wetlands, a restoration plan and schedule must be submitted to IDEM. *Id.* at Order, ¶ 4.
- b. If the Respondent decides to submit an ATF permit, a completed Permit application is due to IDEM within 45 days of the Commissioner Order’s effective date. *Id.* at Order, ¶ 5. The Commissioner’s Order also required Respondent to pay a civil penalty of \$26,750. *Id.* at Order, ¶ 6.

Whether Bankview elects to restore the Site or to seek permitting for the Site, it will need to submit a wetland delineation.

22. As for the amount of civil penalty, IDEM applied the controlling Civil Penalty Policy to calculate a civil penalty of \$26,750 using IDEM’s Civil Penalty Worksheet. *Stip. Ex. 18*. The worksheet’s typographical errors were noted and corrected through hearing testimony of the IDEM staff member who approved the Commissioner’s Order, including penalty, then-Chief of IDEM’s Water Quality Enforcement Samantha Groce. *Hr’g Tr.*, p 168:1 – 170:15. IDEM applied its civil penalty policy to calculate the civil penalty amount. *Stip. Ex. 19*. On the first violation concerning wetlands disturbance, IDEM assessed a major potential for harm and major deviation from the rule, amounting to \$22,500. *Hr’g Tr.*, 170:16 – 171:22. For the second violation, no permit, IDEM assessed a minor potential for harm and a major deviation from the rule, amounting to \$4,250. *Id.*, 172:1 – 173:3. IDEM assessed a civil penalty for both violations and 1 violation day, despite the alleged violations occurring over several years. *Tr. Ex. S-11; Hr’g Tr.* p. 235:8-14. The resulting assessed base amount of \$26,750 assessed was within the normal matrix and consistent with IDEM’s rules and past practices as observed during Groce’s years of experience with IDEM enforcement. *Id.* 173:14 -15. No adjustment factors were applicable to the base amount. *See Hr’g Tr.* p. 172. IDEM maintains the calculated amount of civil penalty assessed, for wetlands of 1 acre and greater. If a wetlands delineation describes a



decreased size of the violation site, the civil penalty is maintained and not reduced. In this case, IDEM enforcement cited a 23-acre Site while IDEM's inspector stated that the Site may prove smaller on delineation, perhaps 11 acres. Bankview did not engage in the inability to pay process to seek a reduction of civil penalty amount. *Id.*, 206:1-11.

23. IDEM stated that the violations assessed and resulting order in Bankview's NOV and Commissioner's Order were consistent with applicable rules and past practices. During Senior Wetlands Program Manager Jason Randolph's eighteen and a half years employed by IDEM, the same datapoint gathering process and the same use of a determination, not a delineation to base enforcement were used here and had been applied throughout his IDEM career. *Hr'g Tr.* p. 146 – 152. *See Groce, supra.*

24. On December 11, 2018, Bankview timely appealed IDEM's November 28, 2018 Commissioner's Order. On February 5, 2020, summary judgment briefing commenced; the parties fully briefed the issues and submitted designated evidence.

25. On July 30, 2020, the Court denied summary judgment ("Summary Judgment Order") to Bankview, finding that genuine issues of material fact remained as to whether IDEM used the correct Site evaluation procedures and whether the Site was a wetland.

26. The parties stipulated that the question before the Court concerns whether wetlands are present on-Site. *June 21, 2023 Stipulation*. The "wetlands-class question (which may be affected by legislation codified from 2021 Senate Bill 389) is therefore premature and unripe for this case". *Id.*, p. 1, ¶ 2 b. The parties agreed that Bankview will not litigate the issue now, and the issue is not waived. *Id.*, p. 2, 3. And, the parties positions on summary judgment remain a part of the Court's record.

27. The parties dispute whether IDEM correctly evaluated the Site for wetland indicators, and if the Site is a regulated wetland.

28. On May 6, 2022, the final hearing was conducted as to whether the Site was a wetland subject to enforcement. Witnesses were sworn, evidence was heard, and exhibits admitted as sustained, stipulated, and incorporated from designated evidence on summary judgment. The parties submitted post-hearing briefs.

29. In its July 26, 2021 post-hearing briefing, Bankview first raised the issue of whether IDEM's enforcement action was an unconstitutional takings.

### **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 a Final Order, issued pursuant to I.C. § 4-21.5-3-27, and as stipulated to by the parties on June 21, 2023. 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.

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. IDEM bears the burden of proving its enforcement action. I.C. § 13-30-3-9.

6. Despite Bankview's contrary argument, the NOV and CO identify the contested Site with sufficient specificity so as to inform Bankview of the extent of the Site in question, and are not sufficiently vague so as to be void. Wetlands extent and boundaries are identified in a wetlands delineation, not a wetlands determination. The twenty-three acres cited in the NOV and CO vary from the IDEM's inspector's assertions that perhaps eleven acres with the twenty-three cited acres are wetlands.

7. Mr. Blinn's relied on mapping and information which did not sufficiently identify the Site as non-wetland. The NRCS Determination specified parcel areas listed the farm as containing some wetland areas but lists most of the specific site as "Not Inventoried – no wetland determination has been completed," not as "not a wetland." Mr. Blinn interpreted the NRCS Delineation to mean that the Site "was not identified as wetlands by the NRCS. NRCS and FSA wetland classifications are not binding upon IDEM for purposes of the Indiana regulated wetland law. *See IDEM 's Aug. 6, 2021 Reply Brief*, p. 8, n. 2 concerning the USACE and NRCS' Feb 5, 2005 Joint Guidance, rescinded Jan. 28, 2020, noting the impossibility of one agency to make wetlands delineations acceptable so as to determine another agency's jurisdiction. Mr.

Blinn has a good-faith belief that the Site was not a wetland, has made long-time contributions to environmental stewardship, Hoosier farming, and the community, and has stated the potential for economic distress. However, the Court is denied equitable powers and regulatory authority to consider these factors into its decision.

8. For purposes of I.C. § 13-18, *et seq.*, “wetlands are areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.” I.C. §13-11-2-265.7. IDEM’s inspector testified that she did not observe a swamp, marsh or bog on the Site, but that wetlands characteristics were generally present. The plain language of I.C. § 13-11-2-265.7 does not limit wetlands to swamps, marshes and bogs, but broadens its applicability to other wetlands characteristic by stating that those features are “generally include[d]” and allows similar areas to be considered. By substantial evidence, the Site is a wetland, despite its lack of swamp, marsh or bog observed by IDEM’s inspector.

9. The parties stipulated that the question before the Court concerns whether wetlands are present on-Site. *June 21, 2023 Stipulation*. The “wetlands-class question (which may be affected by legislation codified from 2021 Senate Bill 389) is therefore premature and unripe for this case”. *Id.*, p. 1, ¶ 2 b. The parties agreed that Bankview Farm II, Inc. (“Bankview”) will not litigate the issue now, and the issue is not waived. *Id.*, p. 2, 3. As stipulated, the wetlands-class question is not now before the Court, will not be litigated at this time by Bankview, and is not waived for future litigation purposes.

10. Bankview contends IDEM must undertake a delineation rather than make a determination regarding the presence of a wetland on the parcel. *Bankview’s July 26, 2021 Post-Hearing Brief*, p. 20. In support of its argument, Bankview cites I.C. § 13-11-2-265.8 and *Huffman v. Office of Env’tl. Adj’d.*, 811 N.E.2d 806, 812 (Ind. 2004) (When a statute is clear, courts do not impose other constructions). Bankview states, “[h]ere the statute is clear; the presence of wetlands is determined by a wetland delineation in accordance with the Manual.” *Bankview’s Post-Hearing Brief*, p. 21.

11. The record in this cause does not contain a wetland delineation. I.C. § 13-11-2-265.8 defines “wetlands delineation” as follows: “wetlands delineation or delineation,” means a technical assessment (1) of whether a wetland exists on an area of land; and (2) if so, of the type and quality of the wetland based on the presence or absence of wetlands characteristics, as determined consistently with the Wetlands Delineation Manual, Technical Report Y-87-1 of the United States Army Corps of Engineers.” While a wetland delineation had been conducted by Bankview on its Site, Bankview successfully excluded the wetland delineation from evidence in this case.

12. Nothing in this statute requires IDEM to undertake a delineation to make its determination that a parcel is a wetland or that it must undertake a delineation before commencing an enforcement action. Bankview’s belief that IDEM must conduct a full delineation to determine the presence of a wetland before it can commence an enforcement

action for violations of State Regulated Wetlands Laws is not supported by the plain language of I.C. § 13-11-2-265.8.

13. Bankview contends “IDEM’s unwritten policy [for determining whether a piece of land is a wetland] is an illegal rule.”<sup>1</sup> *Bankview’s Post-Hearing Brief*, p. 22. Further, “IDEM’s procedure for inspecting a site for a wetland is a ‘rule’ because it implements or interprets Indiana law. It interprets Section 265.8 which requires a Manual delineation.” *Id.* I.C. § 13-18-22-7 authorizes IDEM to create the permit application. 327 IAC 17-4-3 sets forth the permit application requirements. A person proposing to undertake wetland activities in a State Regulated Wetland is required to provide “a delineation of all wetlands on the tract” as part of the application process. 327 IAC 17-4-3(6)(B).

14. IDEM does not rely upon an unwritten policy. There exists no illegal rule that is contrary to law. IDEM employed its standard, historical practice of using the three wetland criteria used in both state and federal wetland programs to determine the presence of a wetland: hydrophytic vegetation, hydric soils, and wetland hydrology. See *U.S. Army Corps of Engineers Wetlands Delineation Manual*, pp. 6, 9 – 10.

15. 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.

16. “Wetland activity” is defined as the discharge of dredged or fill material into an isolated wetland. I.C. § 13-11-2-265.6. Pursuant to 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.

17. A wetland determination requires assessment that the site “supports a prevalence of (1) hydrophytic vegetation, (2) a predominance of hydric soils, and (3) wetland hydrology under normal circumstances.” *Boucher v. United States Dep’t of Agriculture*, 934 F.3d 530 (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

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<sup>1</sup>Ind. Code § 4-22-2-3(b) defines a rule as “the whole or any part of an agency statement of general applicability that (1) has or is designed to have the effect of law; and (2) implements, interprets, or prescribes (A) law or policy or (B) the organization, procedure, or practice requirements of an agency.”

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.” *Id.* at 539. 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.” *Id.* at 535.

18. Facts gathered in IDEM’s 2016 wetlands determination provided substantial evidence, on *de novo* review, that the atypical, disturbed Site is a wetland, per I.C. § 13-11-2-265.6, I.C. § 13-18-22, *et seq.*, 327 IAC 17-1, *et seq.*, the Manual and Supplement, and *Boucher*. To determine that the atypical, disturbed Site is a wetland, the Site must contain two of the three wetland factors – hydrotrophic vegetation, hydric soils, hydrology. By substantial evidence, the Site has sufficient hydric soils and hydrology to be determined to be a wetland.

19. By substantial evidence, IDEM did not meet its burden of proof that the Site had hydrotrophic vegetation indicative that the Site is a wetland, as demonstrated at data point 2. IDEM conducted an analysis of available vegetation. The species dominance test calculations were used to calculate a prevalence index of 2.47. A prevalence index of less than or equal to 3 is an indicator of hydrotrophic vegetation. For data point 1 (“DP1”), IDEM correctly did not examine piles of tree debris, as the original location of living trees could not be traced to the Site with sufficient certainty. Bankview successfully challenges IDEM’s reporting and calculations of hydrotrophic vegetation, based upon data forms used. The data Parsons recorded was noted on a regional version of standard Data Form 1. *Hr’g Ex. 10*; see *Hr’g Ex. 1*, p. 5-8 for data forms used by Parsons and the regional versions of Data Form 1, *Hr’g Ex. 8*, Manual, appendix pp. B4 – B5, B- B8. She did not use Data Form 3, to be used for atypical sites, as is present in this case. *Id.*, p. B6, B9. Thus, “portions of Data Form 3 required inspection and notation of “Previous Vegetation”, to “Attach documentation” of that vegetation, and to consider the “Type of Alteration” and the “Effect on Vegetation”. As this data would result in a percentage, Bankview argues that its exclusion nullifies IDEM’s calculations. And, as the inspection was conducted in winter, vegetation species and volumes were significantly less than in full growing season. Parsons did not capture or analyze the requisite data on the forms she used, nor would winter data provide the required extrapolation of vegetation species and volumes to characterize the Site with accuracy sufficient to provide substantial evidence. By substantial evidence, the Site does not have sufficient indicators of hydrotrophic vegetation to be determined to be a wetland.

20. By substantial evidence, wetland hydric soils were on-Site. Per the Manual, at least one primary indicator of hydric soils was required. On-Site DP1 had Pewamo soil, a soil type predominant in Indiana’s wetlands. DP1 contained two primary indicators of hydric soils: depleted below dark surface, and redox dark surface. By substantial evidence, the Site has sufficient indicators of hydric soils to be determined to be a wetland.

21. By substantial evidence, the Site had wetland hydrology. At least one primary indicator, or two secondary indicators, are required for proof of wetland hydrology. On-Site DP1 had four primary indicators of wetland hydrology: high water table, saturation, inundation visible on aerial imagery, and oxidized rhizospheres. Two secondary indicators were also present:

saturation visible on aerial imagery, and geomorphic positioning. By substantial evidence, the Site has sufficient indicators of hydrology to be determined to be a wetland.

22. IDEM met its burden of proof that the Site is a state-regulated wetland. As the Site is an atypical, disturbed Site, two of the three primary wetlands characteristics were required to be proven for the Site to be determined a state-regulated wetland. The Site had two primary wetlands characteristics: hydric soils and hydrology. By substantial evidence set forth in witness testimony and supporting documentation, IDEM's determination that the Site was a State-regulated wetland, per I.C. § 13-11-2-265.6, I.C. § 13-18-22, *et seq.*, 327 IAC 17-1, *et seq.*, the Manual and Supplement, and *Boucher*.

23. As the Site is a state regulated wetland pursuant to I.C. § 13-11-2-25.8(b), the discharge of dredged or fill material into the wetland observed in Nov., 2015 and January, 2016 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.* Bankview 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.* By substantial evidence, for failure to obtain a permit, Bankview violated I.C. § 13-18-22, *et seq.*, and 327 IAC 17-1, *et seq.*, as cited in the Commissioner's Order.

24. By substantial evidence, IDEM met its burden of proof that Bankview 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 Nov. 28, 2018 Commissioner's Order.

25. As Bankview'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 Bankview 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.

26. 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 Bankview'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.

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

28. 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. For the first violation, substantial

evidence did not address pollution exposure, but did support a major potential for harm, based on the degree of noncompliance on statutory or regulatory purposes or procedures for implementing the program supports. For the second violation, substantial evidence supported a minor potential for harm, as the violation posed a relatively low likelihood of exposure or degree of exposure to pollution, and/or the actions may have an adverse effect on the statutory or regulatory purposes or procedures for implementing the program. By substantial evidence, the first violation concerning site disturbance has a major potential for harm; the second, lack of permit, a minor potential for harm.

29. 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 for both violations.

30. IDEM also determined that violation one was a major harm, major deviation, and that violation two was minor harm, major deviation. IDEM assessed one day for the two violations, without an increase for the economic benefit received by Bankview due to its failure to comply with Indiana environmental laws and regulations. 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 \$26,750 is proper based on the Civil Penalty Worksheet and the factors of the violations.

31. For all of the foregoing reasons, the Indiana Department of Environmental Management's November 28, 2018 Commissioner's Order should be affirmed. Bankview Farms II, Inc.'s December 11, 2018 Petition for Adjudicatory Hearing and Administrative Review, as amended on December 18, 2018 and February 13, 2019, should be denied.

### **FINAL ORDER**

For all the forgoing reasons, **IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that the Bankview Farm II, Inc.'s December 11, 2018 Petition for Adjudicatory Hearing and Administrative Review, as amended on December 18, 2018 and February 13, 2019, of the November 28, 2018 issuance of the Notice and Order of the Commissioner of the Indiana Department of Environmental Management in Case No. 2018-25068-Q is **DENIED**. The Indiana Department of Environmental Management's September 14, 2018 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. 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.

Hon. Mary Davidsen  
Chief Environmental Law Judge