

**Commissioner, Indiana Department of Environmental Management v.  
McClure Oil Corporation, IDEM Case No. 2006-15863-S  
2009 OEA 126, (08-S-E-4109)**

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**OFFICIAL SHORT CITATION NAME:** When referring to 2009 OEA 126, cite this case as  
*McClure Oil Corporation, 2009 OEA 126.*

**TOPICS:**

Summary Judgment  
underground storage tanks  
enforcement  
penalty  
statue of limitations  
continuing duty  
genuine issue of material fact  
release  
investigation  
confirmation  
owner  
operator  
notice of violation  
commissioner's order  
non-rule policy document  
penalty policy  
days of noncompliance  
multiplier

**PRESIDING ENVIRONMENTAL LAW JUDGE:**

Catherine Gibbs

**PARTY REPRESENTATIVES:**

IDEM: Denise Walker, Esq.  
Petitioner: Richard VanRheenen, Esq.; VanRheenen & Associates

**ORDER ISSUED:**

September 22, 2009

**INDEX CATEGORY:**

Land

**PREVIOUS CASE ACTIVITY:**

Non-final order preceding this final order:

[IDEM v. McClure Oil Corporation, 2009 OEA 126nf in .doc format](#)

[IDEM v. McClure Oil Corporation, 2009 OEA 126nf in .pdf format](#)

**FURTHER CASE ACTIVITY:**

Judicial Review

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7. The ELJ has determined that a release of petroleum from underground storage tanks occurred at the Site in 1990 and 1992.
8. In 2003, the IDEM requested that the Respondent perform an ISC in response to the releases that occurred in 1990 and 1992. The Respondent was not the owner of the Site at the time of the releases and had no information regarding the location, nature and/or the extent of the releases. The IDEM was unable to locate any information regarding the releases other than the initial information recorded in IDEM's Incident Reporting Logs (Respondent's Exhibit #1). These Logs contained information that supplied the date of the incident and the Facility but no other information that would assist the Respondent in responding to the specific release. The Respondent refused to conduct the ISC.
9. In November 2007, after the NOV had been issued, but before the CO was issued, the IDEM located more information regarding the extent and nature of the releases. This information was given to the Respondent shortly thereafter.
10. Thomas Newcomb, the IDEM Enforcement Case Manager for this Site, calculated the civil penalty using the Penalty Policy for Underground Storage Tank/Leaking Underground Storage Tank Requirements<sup>1</sup> (the "UST/LUST Policy"). Mr. Newcomb determined that the appropriate penalty was \$3,400 (three thousand and four hundred dollars)
11. Mr. Newcomb based the penalty on a minor potential for harm and a major extent of deviation.
12. Mr. Newcomb averaged the penalties applicable to a minor potential for harm/major extent of deviation violation. Mr. Newcomb testified that this was conducted in accordance with a written policy. The written policy was not introduced into evidence nor was it produced to the Respondent during discovery.
13. The base penalty amount was multiplied by 2, the Days of Noncompliance Multiplier. The Days of Noncompliance Multiplier is determined by the number of days that the Respondent was in violation. In this matter, Mr. Newcomb determined that the Respondent was in violation more than 365 days.

**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 I.C. § 4-21.5-7-3.
2. Findings of Fact that may be construed as Conclusions of Law and Conclusions of Law that may be construed as Findings of Fact are so deemed.

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<sup>1</sup> Non rule policy document, ID No. Enforcement 99-0001-NPD, originally adopted April 5, 1999 in accordance with I.C. § 13-14-1-11.5.

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3. 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 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. The only issues that remain are (1) the appropriate civil penalty, if any, and (2) the appropriate corrective action, if any. The IDEM has ordered the Respondent to pay a civil penalty of \$3,400 (three thousand, four hundred dollars) and to complete the ISC.
5. Mr. Newcomb used the specific guidance provided by the UST/LUST Policy to calculate the penalty in this matter. However, this policy is described as “IDEM’s policy for determining penalties for violations of the 1998 UST Upgrade Requirements which go into effect December 23, 1998”.<sup>2</sup> The Respondent argues that IDEM erred in relying on this policy because the violations in this matter are not related to the 1998 UST Upgrade Requirements. The ELJ concludes that this was not error. This policy was adopted in accordance with I.C. § 13-14-1-11.5. While the description of the non-rule policy document appears to limit it to 1998 UST upgrade violations, the terms of the UST/LUST Policy are not specific to only upgrade violations and can be applied to any UST/LUST violation. In addition, Mr. Newcomb testified that he regularly used this policy to determine the appropriate penalty in all UST/LUST enforcement matters. As I.C. § 13-23-14 limits penalties for violations of UST/LUST regulations to \$10,000 per day per underground storage tank, such a policy specific to USTs is necessary because of the difference in possible penalties between UST violations and general environmental violations<sup>3</sup>.
6. The UST/LUST Policy was based on IDEM’s general Civil Penalty Policy<sup>4</sup> (the “General Policy”). This policy was adopted pursuant to I.C. § 13-14-1-11.5 and may be used as a nonrule policy document in accordance with this statute. Also, the Court of Appeals, in *IDEM v. Schnippel Construction Inc.*, 778 N.E.2d 407 (Ind. Ct. App. 2002), approved of the ELJ’s use of the General Policy in calculating the civil penalty. Therefore, it is acceptable to use the General Policy as the basis for calculating a civil penalty.

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<sup>2</sup> See UST/LUST Policy, Brief Description of Subject Matter, page 1.

<sup>3</sup> In contrast, IDEM may assess a penalty of \$25,000 per day per violation under I.C. § 13-30-4.

<sup>4</sup> IDEM’s Civil Penalty Policy is a non-rule policy document, ID No. Enforcement 99-0002-NPD, originally adopted on April 5, 1999 in accordance with I.C. § 13-14-1-11.5.

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7. 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.
8. 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.
9. The ELJ concludes that the potential for harm is minor. No evidence was presented that the releases have migrated off-site. No actual harm has occurred. It is obvious from the amount of time between the releases occurring and the IDEM following up on the releases (over 11 years) that IDEM does not consider the potential for harm to be significant.
10. The extent of deviation relates to the degree to which the requirement is violated. In this case, the Respondent has failed to perform the ISC. However, given the amount of time between the releases and IDEM’s ISC request, the size of the Site, and the lack of any information regarding the initial releases makes the Respondent’s reluctance to undertake an ISC understandable. However, as soon as the IDEM produced the information in 2007, the Respondent could no longer delay completing an ISC. The ELJ concludes that the extent of deviation is moderate.
11. Mr. Newcomb selected the average penalty in the minor/major matrix. However, he based this decision on a policy that was not produced either at the hearing or to the Respondent as part of discovery. Therefore, the use of this policy was improper and an error. As there is no justification for selecting a higher penalty, the base penalty is \$800.
12. In accordance with the UST/LUST policy, if the owner/operator is out of compliance for more than 365 days, the Days of Noncompliance Multiplier is 2. Technically, the Respondent has been out of compliance since it first acquired the Site (1993). There is no question that the Respondent has known that a release occurred at the Site since 2003 (the date that IDEM notified them of the obligation to conduct an ISC) or, at the very latest, 2007 when IDEM provided the more detailed information. The Respondent had not completed an ISC as of the date of the hearing so more than 365 days have passed since the obligation to conduct an ISC began. The Days of Noncompliance Multiplier is properly 2.
13. The IDEM produced no evidence that either mitigating or aggravating circumstances were considered or that it calculated any economic benefit.

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14. Therefore, the ELJ concludes after a “*de novo* review”, that the proper penalty is \$1,600 (one thousand, six hundred dollars).

**FINAL ORDER**

**AND THE COURT**, being duly advised, hereby **ORDERS, ADJUDGES AND DECREES** that the Respondent, McClure Oil Corporation is in violation of 329 IAC 9-5-5.1 and is assessed a penalty of \$1,600 (One thousand, six hundred dollars). This penalty shall be paid to the Environmental Management Special Fund in accordance with the directions contained by the Notice and Order of the Commissioner of the Indiana Department of Environmental Management. In addition, the Respondent shall complete the Initial Site Characterization (ISC) under the terms and conditions specified in the Notice and Order of the Commissioner of the Indiana Department of Environmental Management issued on April 22, 2008.

You are hereby 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 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 I.C. § 4-21.5. Pursuant to I.C. § 4-21.5-5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

**IT IS SO ORDERED this 22nd day of September, 2009 in Indianapolis, IN.**

Hon. Catherine Gibbs  
Environmental Law Judge