

**Commissioner, Indiana Department of Environmental Adjudication v.  
John Anevski, Owner Anevski Commercial Development a/k/a J.A. Development d/b/a  
Anevski Rough Grading and JTS Plaza Expansion  
2011 OEA 96, (06-W-E-3727)**

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**OFFICIAL SHORT CITATION NAME:** When referring 2011 OEA 96 this case site as  
*John Anevski, 2011 OEA 96.*

**TOPICS:**

hearing  
enforcement  
Notice of Violation (NOV)  
Commissioner Order (CO)  
substantial evidence  
Civil Penalty Policy  
penalty  
erosion  
erosion control  
off-site  
sedimentation  
aggravating  
mitigating  
I.C. § 13-30-3  
I.C. § 13-30-4-1  
327 IAC 15-5-7

**PRESIDING JUDGE:**

Catherine Gibbs

**PARTY REPRESENTATIVES:**

IDEM: Justin Barrett, Esq.  
Respondent: John Anevski, pro se

**ORDER ISSUED:**

July 20, 2011

**INDEX CATEGORY:**

Water

**FURTHER CASE ACTIVITY:**

**Judicial Review: *John Anevski v. IDEMI*, 49D12-1108-MI-031834 (Marion Sup. Ct.)**

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STATE OF INDIANA	)	BEFORE THE INDIANA OFFICE OF
	)	ENVIRONMENTAL ADJUDICATION
COUNTY OF MARION	)	

IN THE MATTER OF:	)	
	)	
COMMISSIONER, INDIANA DEPARTMENT	)	
OF ENVIRONMENTAL MANAGEMENT,	)	
Complainant,	)	
	)	
v.	)	CAUSE NO. 06-W-E-3727
	)	
JOHN ANEVSKI, OWNER ANEVSKI	)	
COMMERCIAL DEVELOPMENT a/k/a J.A.	)	
DEVELOPMENT d/b/a ANEVSKI ROUGH	)	
GRADING and JTS PLAZA EXPANSION	)	
PROJECT,	)	
Respondent	)	

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

This matter comes before the Court for the hearing held on June 24, 2011, with the Indiana Department of Environmental Management and John Anevski present; and the Court, being duly advised and having heard the evidence and read and considered the petition, finds that judgment may be made upon the record and makes the following findings of fact and conclusions of law and enters the following Final Order:

**FINDINGS OF FACT**

1. John Anevski (the Respondent) owns the Anevski Commercial Development, a/k/a J.A. Development, and is the owner, operator and developer of project areas named (1) the Anevski Rough Grading Project, located behind 1093 Eades Parkway; and (2) the JTS Plaza Expansion Project, located at 1093 Eades Parkway, in Lawrenceburg, Dearborn County, Indiana (the Site).
  
2. Based on inspections that occurred on December 22, 2003, March 18, 2004 and August 19, 2004, the IDEM issued an Amended Notice of Violation (the NOV) to the Respondent on February 28, 2005.
  
3. The NOV alleges that the Respondent violated 327 IAC 15-5-7(d), 327 IAC 15-5-7(b) and 327 IAC 15-5-7(c) at the Anevski Rough Grading Project and the JTS Plaza Expansion Project.

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4. The parties did not enter into an agreed order regarding the resolution of the alleged violations.
5. A Notice and Order of the Commissioner of the Indiana Department of Environmental Management (the CO) was issued to the Respondent on May 9, 2006.
6. The Respondent filed his Petition for Review on June 2, 2006.
7. On November 15, 2002, the IDEM and the Respondent entered into an Agreed Order (the AO) regarding violations that occurred at this Site in 2001. This AO provided for stipulated penalties if the Respondent failed to comply with the AO's terms and conditions. The following actions occurred relating to this AO:
  - On April 22, 2003, the IDEM notified the Respondent that he was out of compliance with certain provisions of the Agreed Order and that stipulated penalties were due for March 3, 2003 to April 2, 2003.
  - On December 31, 2003, the IDEM notified the Respondent that he was out of compliance with certain provisions of the Agreed Order and that stipulated penalties were due for April 2, 2003 through October 16, 2003.
  - The IDEM filed a Petition for Civil Enforcement in Dearborn County Circuit Court on November 18, 2004 seeking to collect these stipulated penalties.
  - The Petition for Civil Enforcement was dismissed with prejudice on July 17, 2007 (the Dismissal Order) as a result of the IDEM filing a motion to voluntarily dismiss the Petition.
8. The IDEM filed a Motion for Partial Summary Judgment on August 31, 2007. Counsel for Respondent filed a response to IDEM's motion and a cross motion for summary judgment on October 12, 2007. After briefing concluded, the presiding ELJ granted partial summary judgment in the IDEM's favor and concluded that the dismissal of the Petition for Civil Enforcement did not preclude the issuance of the CO.
9. At the final hearing, the IDEM presented evidence regarding the violations that allegedly occurred on August 19, 2004. No evidence was presented regarding the alleged violations of December 22, 2003 or March 18, 2004.
10. At the final hearing, the Respondent presented no substantial testimony or evidence that contradicts the IDEM's evidence of the violations that were observed on August 19, 2004.
11. The ELJ finds that the following conditions existed at the Site on August 19, 2004:
  - a. Disturbed areas were not adequately protected through seeding. Some seeding had been done but vegetative cover was not adequate to control erosion.

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- b. Conveyance channels had not been stabilized. Sediment had accumulated in a detention pond. The pond needed to be stabilized and adequate sediment control needed to be installed to prevent sediment laden runoff from entering a 12 inch pipe in the pond.
- c. Erosion and sediment control measures were not installed properly as evidenced by off-site sedimentation.
- d. Outlets were not adequately stabilized.
- e. Sediment was observed off-site. Sediment entering the channel on the west side of the property was being conveyed off-site through a culvert under U.S. 50.

*See Plaintiff's Exhibit 2.*

- 12. The IDEM presented sufficient evidence that conditions at the Site on August 19, 2004, were unsatisfactory and in violation of 327 IAC 15-5-7(d), 327 IAC 15-5-7(b) and 327 IAC 15-5-7(c).
- 13. The Respondent is developing a portion of the property known as Lighthouse Drive/Lighthouse Drive West. This is contiguous to the Site<sup>1</sup> at which the violations occurred. Both parties presented evidence regarding the current condition of the Site, including the condition of Lighthouse Drive/Lighthouse Drive West. The evidence presented as to the condition of Lighthouse Drive/Lighthouse Drive West is irrelevant, but that evidence which relates to the current condition of the Site and indicates what corrective action must still be taken at the Site is relevant and will be considered for that limited purpose only.
- 14. The undisputed evidence is that the portion of the Site labeled "Rough Grading" is in compliance and no further corrective action is necessary.
- 15. The IDEM presented sufficient evidence that further corrective action is necessary to stabilize the erosion and sediment control measures at that portion of the Site labeled "JTS Plaza Extension".

**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. This is a Final Order issued pursuant to I.C. § 4-21.5-3-27. 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.

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<sup>1</sup> As previously defined in Finding of Fact #1, the Site is limited to Anevski Rough Grading Project and the JTS Plaza Expansion Project as shown on Plaintiff's Exhibit 3.

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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. 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. § 4-21.5-3-14; I.C. § 4-32.5-3-27(d). "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 at 129. *See also Blue River Valley*, 2005 OEA at 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.
5. The Respondent in this case was represented by counsel at one point. However, counsel withdrew in January 2011 and no new counsel entered an appearance. Parties who choose 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 their action. *Shepherd v. Truex*, 819 N.E.2d 457, 463 (Ind. Ct. App. 2004).
6. Pursuant to I.C. § 13-30-3-3, the IDEM must notify an alleged violator that a possible violation has occurred and offer the alleged violator an opportunity to enter into a settlement (the Notice of Violation or "NOV"). In this matter, the NOV was issued on February 28, 2005.
7. If no settlement is reached, then, after a period of 60 days, the IDEM, pursuant to I.C. § 13-30-3-4, may issue a notice and order of the commissioner (the CO). The CO was issued to the Respondent on May 9, 2006, more than 60 days after the issuance of the NOV.
8. Pursuant to I.C. § 13-30-3-9, the IDEM, as the complainant, has the burden of proving the alleged violations.

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9. 327 IAC 15-5-7 (in effect in 2004) states:
- (a) The operator shall develop an erosion control plan in accordance with the requirements under this section.
  - (b) The following requirements shall be met on all sites during the period when active land disturbing activities occur:
    - (1) Sediment-laden water which otherwise would flow from the site shall be detained by erosion control practices appropriate to minimize sedimentation in the receiving stream. No storm water shall be discharged from the site in a manner causing erosion in the receiving channel at the point of discharge.
    - (2) Appropriate measures shall be taken by the operator to minimize or eliminate wastes or unused building materials, including, but not limited to, garbage, debris, cleaning wastes, wastewater, and other substances from being carried from a site by run-off. Proper disposal or management of all wastes and unused building materials, appropriate to the nature of the waste or material, is required.
    - (3) Sediment being tracked from a site onto public or private roadways shall be minimized. This can be accomplished initially by a temporary gravel construction entrance in addition to a well-planned layout of roads, access drives, and parking areas of sufficient width and length, or other appropriate measures.
    - (4) Public or private roadways shall be kept cleared of accumulated sediment. Bulk clearing of accumulated sediment shall not include flushing the area with water. Cleared sediment shall be returned to the point of likely origin or other suitable location.
    - (5) All on-site storm drain inlets shall be protected against sedimentation with straw bales, filter fabric, or equivalent barriers meeting accepted design criteria, standards, and specification for that purpose.
    - (6) The following items apply during the time the construction activity is taking place:
      - (A) Storm water drainage from adjacent areas that naturally pass through the site shall be controlled by diverting it around disturbed areas. Alternatively, the existing channel must be protected and/or improved to prevent erosion or sedimentation from occurring.
      - (B) Run-off from a disturbed area shall be controlled by one (1) or more of the following measures:
        - (i) Except as prevented by inclement weather conditions or other circumstances beyond the control of the operator, appropriate vegetative practices will be initiated within seven (7) days of the last land disturbing activity at the site regulated by this rule. Appropriate vegetative practices include, but are not limited to, seeding, sodding, mulching, covering, or by other equivalent erosion control measures.
        - (ii) The erosion control plan shall be implemented on disturbed areas within the construction site. The plan shall include erosion control measures as appropriate, such as, but not limited to, the following:
          - (AA) Sediment detention basins.

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- (BB) Sediment control practices, such as filter strips, diversions, straw bales, filter fences, inlet protection measures, slope minimization, phased construction, maximizing tree coverage, temporary and permanent seeding of vegetation, mulching, and sodding.

All measures involving erosion control practices shall be designed and installed under the guidance of a qualified professional experienced in erosion control and following the specifications and criteria under this subsection. All other non-engineered erosion control measures involving vegetation should be installed according to accepted specifications and criteria under this subsection.

- (c) During the period of construction activity at a site, all erosion control measures necessary to meet the requirements of this rule shall be maintained by the operator.
- (d) All erosion control measures required to comply with this rule shall meet the design criteria, standards, and specifications for erosion control measures established by the department in guidance documents similar to, or as effective as, those outlined in the Indiana Handbook for Erosion Control in Developing Areas from the division of soil conservation, Indiana department of natural resources and the Field Office Technical Guide from the Soil Conservation Service. The erosion control plan shall include, but is not limited to, the following:
  - (1) A map of the site in adequate detail to show the site and adjacent areas, including the following:
    - (A) Site boundaries and adjacent lands which accurately portray the site location.
    - (B) Lakes, streams, channels, ditches, wetlands, and other water courses on and adjacent to the site.
    - (C) One hundred (100) year floodplains, floodway fringes, and floodways.
    - (D) Location of the predominant soil types which may be determined by the United States Department of Agriculture, SCS County Soil Survey, or an equivalent publication, or as determined by a certified professional soil scientist.
    - (E) Location and delineation of vegetative cover such as grass, weeds, brush, and trees.
    - (F) Location and approximate dimensions of storm water drainage systems and natural drainage patterns on, and immediately adjacent to, the site.
    - (G) Locations and approximate dimensions of utilities, structures, roads, highways, and paving.
    - (H) Site topography, both existing and planned, at a contour interval appropriate to indicate drainage patterns.
    - (I) Potential areas where point source discharges of storm water may enter ground water, if any.

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- (2) A plan of final site conditions on the same scale as the existing site map showing the site changes.
  - (3) A site construction plan shall include, but is not limited to, the following:
    - (A) Locations and approximate dimensions of all proposed land disturbing activities.
    - (B) Potential locations of soil stockpiles.
    - (C) Locations and approximate dimensions of all erosion control measures necessary to meet the requirements of this rule.
    - (D) Schedule of the anticipated initiation and completion dates of each land disturbing activity, including the installation of erosion control measures needed to meet the requirements of this rule.
    - (E) Provisions, including a schedule, for maintenance of the erosion control measures during construction.
    - (F) Where feasible, preserve vegetation that exists on the site prior to the initiation of land disturbing activities.
10. The Respondent initially argues that the dismissal of IDEM's Petition for Civil Enforcement in Dearborn County bars this enforcement action. However, on January 24, 2008, this ELJ has previously decided that while the action in Dearborn County bars IDEM from collecting stipulated penalties for the period March 3 to October 16, 2003, it does not bar IDEM from pursuing an enforcement action for violations that occurred on other dates. The Respondent has not offered any reason which would allow the Court to reconsider this decision.
11. The Respondent was in violation of 327 IAC 15-5-7 on August 19, 2004 at the Site.
12. I.C. § 13-30-4-1 authorizes the IDEM to assess a penalty of \$25,000 per day per violation. The IDEM used the Civil Penalty Policy<sup>2</sup> 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.
13. 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.

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<sup>2</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 IC 13-14-1-11.5.



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14. The policy further states that the extent of deviation relates to the degree to which the requirement is violated. A moderate extent of deviation is defined as “The violator significantly deviates from the requirements of the regulation, permit, or statute or only some of the requirements are implemented”.
15. The IDEM assessed a penalty of \$8,750 for each of the following violations: (1) failure to implement and maintain erosion control and (2) off-site release of sedimentation into waters of the State. The IDEM decided that the potential for harm for both violations was moderate and that the extent of deviation was also moderate. The Civil Penalty Policy sets the range for a violation of moderate potential for harm and moderate extent of deviation at \$7,500 to \$10,000.
16. The aggravating factors in this instance are that the IDEM has been working with the Respondent for several years to bring the Site into compliance. To a certain extent, this has been successful as shown by the Rough Grading area being brought into compliance. This has not been the case with the JTS Plaza Extension. While the Respondent believes that this area is in compliance, substantial evidence presented by witnesses for the IDEM show that the area is not in compliance with the regulations. Further, the IDEM presented substantial evidence that Mr. Anevski’s resisted efforts by IDEM, local and other state personnel to point out methods for bringing the Site into compliance.
17. There are no mitigating factors.
18. The ELJ concludes that the potential for harm is moderate because of the length of time that the Respondent has been out of compliance. Further, the extent of deviation is moderate because the Respondent made attempts to comply with the regulations.
19. The aggravating factors support selecting a penalty from the middle of the penalty range (\$8,750).
20. The IDEM presented substantial evidence of 2 violations. Therefore, the appropriate penalty is \$17,500 ( $\$8,750 \times 2 = \$17,500$ ).
21. The Anevski Rough Grading Project, located behind 1093 Eades Parkway in Lawrenceburg, Dearborn County, Indiana is in compliance and no further corrective action is necessary.
22. The JTS Plaza Expansion Project, located at 1093 Eades Parkway, in Lawrenceburg, Dearborn County, Indiana is not in compliance and further action is necessary to bring this area into compliance.

**FINAL ORDER**

**AND THE COURT**, being duly advised, hereby **ORDERS, JUDGES AND DECREES** that:

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- (1) John Anevski and Anevski Commercial Development, a/k/a J.A. Development, is in violation of 327 IAC 15-5-7(d), 327 IAC 15-5-7(b) and 327 IAC 15-5-7(c);
- (2) is assessed a penalty of Seventeen Thousand Dollars (\$17,500) to be paid within thirty (30) days of the effective date of this Order. This penalty shall be paid to the Environmental Management Special Fund in accordance with Paragraph 13 of the Notice and Order of the Commissioner of the Indiana Department of Environmental Management; and
- (3) is further ordered to comply with Paragraph 1, 2, 3, 4, 5, 6, 7 8, 9, 10 and 11 of the Notice and Order of the Commissioner of the Indiana Department of Environmental Management issued on May 10, 2006.

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 20th day of July, 2011 in Indianapolis, IN.**

Hon. Catherine Gibbs  
Environmental Law Judge