

TOPICS:

commissioner order	Department of Natural Resources
notice of violation	fire department
spill	report
crude oil	contaminated soil
brine	TPH
spill response	hazardous
owner/operator	sulfites
confirmatory testing	sulfates
soil	chlorides
327 IAC 2-6.1	migrate
2 hours	surface water
oil well	subsoil
tank battery	facility boundary
gun barrel	oil and gas lease
fire wall	spill response
surface estate	civil penalty
incorporeal inheritance	

PRESIDING JUDGE:

Vogel

PARTY REPRESENTATIVES:

Petitioner: Mark E. Shere, Esq.
IDEM: Mike Byron, Esq.

ORDER ISSUED:

April 10, 2003

INDEX CATEGORY:

Enforcement
Land

FURTHER CASE ACTIVITY:

[none]

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

COMMISSIONER, INDIANA DEPARTMENT OF)
ENVIRONMENTAL MANAGEMENT) Cause No. 02-S-E-2913
)

) Complainant
)

) vs.
)

THREE STAR DRILLING AND PRODUCING)
CORPORATION)
MT. VERNON, POSEY COUNTY, INDIANA.)

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND
FINAL ORDER CONFIRMING COMMISSIONER’S ORDER**

This case is before the Indiana Office of Environmental Adjudication (“OEA”) pursuant to a timely petition for administrative review of the Notice and Order of the Commissioner of Indiana Department of Environmental Management (“IDEM”) #2001-10180-S filed by Three Star Drilling and Producing Corporation (“Three Star”) on July 2, 2002.

On March 1, 2001, a Notice of Violation (“NOV”) was issued to Three Star for failing to report, and properly respond to a spill of crude oil and brine in violation of 327 IAC 2-6.1-7 and for the discharge of brine water and crude oil into the environment, in violation of IC 13-30-2-1(1). Three Star and IDEM failed to settle the violation charge and on June 13, 2002, a Notice and Order of the Commissioner was issued to Three Star for these violations. More than sixty (60) days passed between issuance of the NOV and the Commissioner’s Order.

Pursuant to a case management order, the parties conducted discovery. A final evidentiary hearing was held on the record at the OEA on December 12, 2002, and closing arguments were held January 23, 2003. The parties filed post-hearing briefs and proposed findings of fact and conclusions of law. Upon receipt of the record on January 14 and February 6, 2003, and subsequent review of the record, the Court ordered supplemental evidence to support the record.

The Environmental Law Judge (ELJ), having read and considered the petitions, motions, record of proceedings, evidence, and the briefs and responses of the parties, now finds that judgment may be made upon the record. The ELJ, by a preponderance of the evidence, now makes the following findings of fact and conclusions of law, and enters the following Order with respect to the Petition of Three Star:

Statement of Issues

The issue under consideration by the OEA is whether IDEM met the required burden of proof to support the Commissioner's Notice and Order against the Respondent, Three Star. The issues of proof include:

1. The facility boundary of Three Star Drilling and Producing Corporation.
2. Did the owner/operator of Three Star violate 327 IAC 2-6.1-7 by failing to report the spill of January 2, 2001 to the IDEM?
3. Was the spill response taken by the owner/operator of Three Star sufficient to meet the requirements of 327 IAC 2-6.1-7?
4. Does IDEM have authority to order confirmatory testing of the soil and further remediation if any detection of TPH is discovered?

Findings of Fact

1. 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.
2. Three Star, located at 201 South Christy, Sumner, Illinois, owns and operates an oil pumping station located at 5800 Bigge Lane, Mt. Vernon, Posey County, Indiana. Darrel Hundley is the general manager of Three Star and the employee responsible for operations at the site;
3. Three Star operates the oil pumping station as lessee of the Joseph Gumbel oil and gas lease ("Gumbel lease"), granted to C. A. Malott, recorded on January 31, 1938, book 6 page 555, Posey County, Indiana and located at SW/4 SE/4 Sec. 36-6S-12W containing 40 acres, more or less. (Oil & Gas Lease, Joseph Gumbel, attachment B, IDEM's Supplemental Evidence, Purchase and Sale Agreement Ira S. Patton, et ux d/b/a Three Star Drilling and Producing Company Corp., Three Star's Supplemental Evidence).
4. The surface estate of the land described above, also known as 5880 Bigge Lane, Mt. Vernon, IN, is owned by Larry A. Whitsell and Barbara A. Whitsell, husband and wife. (Warranty Deed, attachment D, IDEM's Supplemental Evidence).
5. An easement of ingress and egress granted to the German Township Water District runs with the above described land. (Attachment C, Easement, IDEM's Supplemental Evidence).
6. One active oil well is located on the forty acres of the Gumbel Lease; the oil pumping station contains a tank battery consisting of two oil stock tanks, one gun barrel or separator and a water tank and includes underground flow line connections leading from the well to the tank.

7. A gun barrel is the central tank that collects the fluids from the oil well, permitting the separation of oil from the brine.
8. On January 2, 2001 the 5' by 20' gun barrel of the oil well at 5880 Bigge Lane, with a capacity of approximately 2000 gallons, tipped over and spilled its entire contents of brine and oil mixture on the ground.
9. Approximately 420 to 630 gallons of crude oil and 1370 to 1580 gallons of brine spilled onto the soil within and outside of the fire wall (a protective berm) surrounding the tank battery and onto the property of Larry Whitsell.
10. At approximately 6:00 p.m. Larry Whitsell called Larry Schmitt, President of K.S. Oil Company and operator of the oil pump for Three Star, and advised him of the oil spill on the Gumbel Lease.
11. Mr. Schmitt arrived at the site at about 6:20 p.m. and called the Department of Natural Resources, and the Lawrence Township Fire Department, to notify them of the spill. Between 10:00 and 11:00 p.m. in the evening of January 2, 2001 Larry Schmitt reached Darrell Hundley, responsible person at Three Star for compliance with environmental laws and regulations, to notify him of the oil spill.
12. No adequate containment effort or removal of free liquids was attempted on the spill the night of January 2, 2001. The pump was shut down by the time Larry Schmitt arrived.
13. Mr. Hundley did not report the oil spill to IDEM within two (2) hours of learning of the spill; instead he set his alarm for 3:00 a.m. and went to bed. IDEM on-site coordinator, Ken Rhame, first learned of the spill from the US EPA on-site coordinator, Mr. Stavros, by telephone on January 2, 2001 between 11:00 and 12:00 p.m.
14. Ken Rhame attempted to contact Darrel Hundley several times that night at an emergency telephone number posted on the oil tank but was unable to contact him; Mr. Rhame then proceeded to drive to the spill site and arrived about 1:00 a.m. on January 3, 2003.
15. At approximately 6:00 a.m. on January 3, 2001 Darrel Hundley arrived at the Gumbel Lease site in Mt. Vernon, IN., having driven from Illinois; he first spoke to IDEM on-site coordinator, Ken Rhame, the morning of January 3, 2001.
16. On January 3, 2001 Darryl Hundley retained K.S. Oil President, Larry Schmitt, as contractor, to clean up the oil spill at 5800 Bigge Lane, Mt. Vernon, IN. Larry Schmitt ordered a backhoe, tank truck and tail box (dumpster) for the excavation of contaminated soil. Four loads of contaminated soil were removed from the site on January 3 and 4, 2001.

17. Ken Rhame, of IDEM, requested that Darryl Hundley collect two confirmatory soil samples for testing for TPH (total petroleum hydrocarbons). Larry Schmitt collected the samples on January 10, 2001. To-date, no testing has been done on any soil from the site.
18. Crude oil and brine mixed with crude oil contain TPH, a pollutant hazardous to human and animal health; brine contains sulfites, sulfates and chlorides. When spilled onto the ground crude oil and brine may migrate through the soil to surface water and ground water.

Discussion

IDEM requires the reporting of petroleum spills to the soil beyond the oil facility boundary when the amount spilled exceeds fifty-five (55) gallons. Spills of objectionable substances of a quantity and type and present for a duration and in a location so as to damage waters of the state must also be reported to IDEM¹. Three Star spilled approximately 420 to 630 gallons of oil and 1370 to 1580 gallons of brine (objectionable material) on January 2, 2001. Three Star alleges that the spill was not reportable because the oil and brine did not spill to the soil beyond the facility boundary.

Indiana law applicable to the determination of “facility boundary” for purposes of the spill rule are found in at least two separate state statutes or rules which must be considered in *pari materia*. Where separate statutes are passed upon the same matter or subject, laws in *pari materia* are to be construed together. State v. Gerhardt, 145 Ind. 439, 44 N.E. 469.

The IDEM spill rule² describes “facility boundary” as the boundary of a facility or an easement or right-of-way. The term “facility” includes all land, buildings, equipment and structures located on a single site and that are owned or operated by the same person³. The surface land upon which Three Star operated its oil and gas lease, however, was owned by Larry Whitsell, an individual with no business relationship with Three Star.

To determine the nature of the interest that Three Star owns in the 40 acres of the Gumbel Lease one must look at oil and gas lease law established in the State of Indiana. “Oil and gas leases create an interest in real estate known to the law as an incorporeal hereditament” Heeter v. Hardy (1948), 118 Ind. App. 256, 76 N.E. 2d 590 (*transfer denied*) cited in Halbert v. Hendrix et al 121 Ind. App. 43 at 48; 95 N.E. 2d 221; 1950 Ind. App. LEXIS 220. When an oil and gas lease is executed, the lease does not convey title to the oil under the land, rather, the lease creates in the lessee an exclusive right to explore and reduce the oil to lessee’s possession. The oil then becomes the lessee’s personal property, not an estate in land. The lessor retains the right to the surface land subject to the lessee’s easement for ingress and egress from the subsurface. Foertsch v Schaus, 477 N.E. 2d 566 at 570; 1985 Ind. App. LEXIS 2364. Additionally, Ind. Code

¹ 327 IAC 2-6.1-6(4)(B) Spills to soil beyond the facility boundary: (ii) spills of petroleum when the amount spilled exceeds fifty-five (55) gallons; or (iii) spills of objectionable substances as defined in section 4(11) of this rule.

² 327 IAC 2-6.1-4(8).

³ 327 IAC 2-6.1-4(7) “Facility” means all land, buildings, equipment, structures, and other stationary items that are located on a single site or on contiguous sites and that are owned or operated by the same person or by any person who controls, is controlled by, or is under common control with, such person.

§ 32-5-7-2 further limits the leasehold interest of Three Star in holding the lessee accountable for any damages to the surface of such lands from the operation of the lease⁴.

Three Star also alleges that the spill response of Darrel Hundley was sufficient and reasonable and that Three Star did not violate 327 IAC 2-6.1-7⁵ in failing to undertake an emergency spill response. An appropriate spill response as defined in 327 IAC 2-6.1-4 (16) would have been to contain the spill and remove or neutralize free material. Three Star relied on a “snow berm” to contain the brine and oil and made no effort to remove free material until after 12 hours of learning of the spill.

Conclusions of Law

Based on the foregoing Findings of Fact and Discussion, the Environmental Law Judge concludes, as a matter of law:

1. The Indiana Office of Environmental Adjudication has jurisdiction over decisions of the Commissioner of the Indiana Department of Environmental Management (IDEM) and the parties to the controversy pursuant to IC 4-21.5-3-23.
2. The oil spill from the gun barrel at the Gumbel Lease, 5800 Bigge Lane, Mt. Vernon, IN on January 2, 2001 was a spill beyond the facility boundary and was a reportable spill subject to 327 IAC 2-6.1-7.
3. Three Star failed to report the spill within two (2) hours of discovery pursuant to 327 IAC 2-6.1-7(3), in violation of the spill reporting rule.
4. The snow berm constructed by Larry Schmitt was the only emergency spill response conducted by Three Star and violated the requirements in 327 IAC 2-6.1-7 to adequately contain the spill and remove free product.

⁴ IC 32-5-7-2 (c) Any person who, being lawfully entitled to do so, enters upon any lands in this state for the purpose of exploring, prospecting, testing, surveying, or otherwise investigating the potential of such lands for oil and gas, or the purpose of conducting operations thereon for the production of oil and gas, shall be accountable to the owner of the surface of such lands for the actual damage resulting therefrom to the surface of such lands....

⁵ 327 IAC 2-6.1-7 Any person who operates, controls, or maintains any mode of transportation or facility from which a spill occurs shall, upon discovery of a reportable spill to the soil or surface waters of the state, do the following: (1) Contain the spill, if possible, to prevent additional spill material from entering the waters of the state; (2) Undertake or cause others to undertake activities needed to accomplish a spill response....

5. Pursuant to IC § 13-24-1-6 (a), to allow the commissioner to take or to assess the need for removal or remedial action under section 1, 2, 3 of this chapter or to enforce this chapter, an owner, an operator, or a responsible party of a facility, upon the request of an officer, an employee, or a designated representative of the department, shall:
 - (1) furnish information relating to the facility or the facility's associated equipment or contents;
 - (2) conduct testing of the facility or the facility's associated equipment or contents;
 - (3) conduct testing of soils, air, surface water or ground water surrounding the facility if the testing using methods that are similar to but do not exceed federal standards, confirms the release of petroleum, or if other evidence exists that gives cause for reasonable suspicion that a release has occurred.
6. IDEM has the authority pursuant to IC 13-24-1-6(a) to require Three Star to conduct confirmatory soil sampling analyses for TPH following the petroleum spill, as long as such measures do not exceed federal standards.
7. Based on the above citations confirmatory soil sampling mandated by IDEM is authorized and appropriate.
8. Pursuant to IC 13-30-4-1, The Commissioner of IDEM may assess penalties of up to \$25,000 per day per violation of any violation of any environmental management laws, or a rule or standard adopted by one of the boards.
9. IDEM has met its burden of proof and persuasion in establishing facts to support the two violations alleged in the Notice and Order of the Commissioner.

ORDER

Three Star Drilling and Producing Corporation shall pay a civil penalty in the amount of \$4,250. This penalty shall be remitted to the Department of Environmental Management within thirty (30) days of the effective date of this Order. Checks shall be made payable to the Environmental Management Special Fund, with the Case Number indicated on the check and mailed to: Cashier, IDEM 100 North Senate Avenue, P. O. Box 6015, Indianapolis, IN 46206-6015.

Three Star shall submit a written spill report to IDEM within thirty days of the Effective Date of this Order. Three Star shall also conduct confirmation TPH sampling of the Site pursuant to the requirement of the Risk Integrated system of Closure (RISC) IDEM Nonrule Policy Document, effective Feb. 15, 2001 (Ind. Reg., Vol. 24, No. 6, Mar. 1, 2001, page 1986 revised Oct. 2002 (Ind. Reg. Vol. 26, No.2, Nov. 1, 2002, page 576) within thirty (30) days of the Effective Date of this Order. Three Star shall submit the soil sample analysis, along with a diagram showing where the samples were collected within forty-five (45) days of the Effective Date of this Order. Three Star shall afford IDEM an opportunity to do split sample testing of the soil.

Three Star Drilling and Producing Corporation, Mt. Vernon, Posey County, Indiana
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The issue of non-detect of TPH in the tested soil is held in abeyance. The OEA retains jurisdiction of any remediation ordered subsequent to the testing of the soil.

You are further advised that, pursuant to Indiana Code §4-21.5-5, this Final Order is subject to judicial review. A Petitioner 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 10TH DAY OF APRIL, 2003 in Indianapolis, IN.

Candace T. Vogel
Environmental Law Judge