

**Commissioner, Indiana Department of Environmental Management v.
Baldev “Dave” Singh, d/b/a Marathon Gas Station
3118 West 15th Avenue / IDEM Case No. 2007-17438-S
2100 Virginia Street / IDEM Case No. 2007-17439-S
Gary, Lake County, Indiana
2011 OEA 44, (09-S-E-4276)**

OFFICIAL SHORT CITATION NAME: When referring to 2011 OEA 44 cite this case as
Baldev Singh, 2011 OEA 44.

TOPICS:

underground storage tank (UST)	base civil penalty
Penalty Policy for UST	potential for harm
leaking underground storage tank	extent of deviation
Penalty Policy for LUST	matrix
gas station facilities	days of noncompliance
owner	aggravating/mitigating factors
operator	economic benefit
tenants	inability to pay
monthly leak detection	delayed cost
monthly release detection	capital cost
automatic product line leak detection	permit
annual product line testing	I.C. § 13-23-1-2
annual line leak detection testing	I.C. § 13-23-14-2, -3
Agreed Order	329 IAC 9-7-2(1), (2)
Commissioner’s Order	329 IAC 9-3-1(c)(3), (d)
summary judgment	<i>McClure Oil</i> , 2009 OEA 126
civil penalty	<i>Landers</i> , 2009 OEA 109
requirements	<i>Scherb</i> , 2006 OEA 16
Civil Penalty Policy	<i>Great Barrier Insulation</i> , 2005 OEA 57

PRESIDING JUDGE:

Mary L. Davidsen

PARTY REPRESENTATIVES:

IDEM: April D. Lashbrook, Esq.
Respondent: Lawrence A. Vanore, Esq., Kate Shelby, Esq.;
Taft Stettinius & Hollister

ORDER ISSUED:

April 11, 2011

INDEX CATEGORY:

Land

FURTHER CASE ACTIVITY:

[none]

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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. 09-S-E-4276
)
 BALDEV ‘DAVE’ SINGH, d/b/a MARATHON GAS STATION)
 at 3118 WEST 15TH AVENUE, IDEM Case No. 2007-17438-S and)
 at 2100 VIRGINIA STREET, IDEM Case No. 2007-17439-S)
 GARY, LAKE COUNTY, INDIANA,)
 Respondent)

FINDINGS OF FACT, CONCLUSIONS OF LAW and FINAL ORDER

This matter came before the Office of Environmental Adjudication (“OEA” or “Court”) on summary judgment as to whether Indiana environmental laws were violated at two gas station facilities operated by Respondent Baldev “Dave” Singh. In a partial grant of summary judgment, this Court found that violations occurred, but that a genuine issue of material fact remained as to the exact amount of penalty, all as stated in the Court’s February 2, 2010 Findings of Fact, Conclusions of Law and Order, incorporated herein by reference.

This matter is now before the Court pursuant to a February 4, 2010 Final Hearing, as to the penalties to be assessed against Respondent, Baldev “Dave” Singh, d/b/a Marathon Gas Station, at 3118 West 15th Avenue and at 2100 Virginia Street, Gary, Lake County, Indiana, for lack of documentation of the gas stations’ monthly leak detection on underground storage tanks, annual product line tightness testing, and annual automatic line leak detection testing. Despite effort, Respondent was not able to locate documentation to refute the Indiana Department of Environmental Management’s (“IDEM”) substantive allegations of violations at the two gasoline stations and elected not to contest the allegations. The Chief Environmental Law Judge (“ELJ”) having considered the petitions, testimony, evidence, and pleadings of the parties, now finds that judgment may be made upon the record. 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 Final Order:

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FINDINGS OF FACT

1. Since 1998, Petitioner Baldev “Dave” Singh (“Singh”) has worked in gas station facilities operations, and presently owns and/or operates several Indiana gas station facilities. Two of the Marathon gasoline stations with underground storage tanks (UST) and UST systems in Gary, Lake County, Indiana, are the subjects of this administrative cause. The “15th Ave. Station” is located at 3118 West 15th Avenue; the “Virginia St. Station” is located at 2100 Virginia Street. IDEM Notification for Underground Storage Tank forms were signed by “Sarbjit Singh”¹ for each station, listing Dave Singh as each station’s UST “Operator” and “Contact at Tank Location, with a mailing address for Dave Singh at 1345 West Southport Road, Indianapolis, IN. *IDEM Motion for Summary Judgment*² Exs. A, H, *Underground Storage Tank Notification forms*. Respondent Singh testified that he owns the Virginia St. Station. By substantial evidence, Respondent Singh is liable as operator for the 15th Ave. Station, per his testimony that he is responsible for the 15th Ave. Station, although it is owned by his brother, Vurmit Singh. *Tr. p. 25*.
2. Respondent Singh testified that the stations are operated by tenants, per terms of leases set to expire in two to three years after February 4, 2010. *Tr. p. 28*.
3. Based on October 2, 2006 and October 3, 2007 station inspections by IDEM UST inspector Robert Strimbu, IDEM issued Notices of Violation (“NOV”) to Respondent Singh on February 8, 2008 (15th Avenue Station) and on February 15, 2008 (Virginia St. Station), citing Respondent Singh’s failure to complete monthly leak detection, install automatic product line leak detection, complete annual product line tightness testing, and complete annual automatic line leak detection testing at both facilities. *IDEM Exs. B, C, D, O*. The parties did not enter into proposed Agreed Orders to resolve these issues with IDEM.
4. IDEM issued a Commissioner’s Orders for each station on May 21, 2009. *IDEM Exs. G, N*.
5. This cause is the subject of Respondent Singh’s timely June 11, 2009 Petition for Administrative Review of the Commissioner’s Orders. The matter proceeded to summary judgment. This Court issued its Findings of Fact, Conclusions of Law, and Order on February 2, 2010 (incorporated herein). In summary, the Court held that for the 15th Avenue Station, Respondent Singh is liable for the following violations of 329 IAC 9-7-2(1) and (2): failure to complete monthly leak detection at any time, failure to install automatic product line leak detection on the regular unleaded tank, failure to complete annual product line tightness testing in 2006, and failure to complete annual automatic line leak detection testing in 2006. Inspection reports indicated that Respondent Singh did not maintain any tank

¹ At Final Hearing, Respondent Singh testified that Sarbjit Singh is his brother. *Tr. p. 51*.

² Unless otherwise specified, exhibit citations in this order refer to exhibits attached to IDEM’s Motion for Summary Judgment, admitted into evidence without objection at Final Hearing. Transcript citations refer to the Final Hearing transcript.

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documentation at the Station, nor did he provide it to IDEM upon request, as required by 329 IAC 9-3-1(c)(3) and (d). *IDEM Exs. B, C, and O, Inspection Reports and Affidavit of Robert Strimbu*. Although Respondent Singh provided IDEM with Midwest Tank Testing reports dated May 2, 2007 and May 1, 2008, documenting annual testing of the automatic line leak detection and annual line tightness testing, he did not provide evidence that monthly release detection on the tanks was performed pursuant to 329 IAC 9-7-2 (1). *See IDEM’s Ex. E, Midwest Tank Testing Reports*. Further, the May 2, 2007 and May 1, 2008 Midwest Tank Testing reports indicate that automatic line leak detection was not installed on the regular unleaded tank. *Id.*

6. The Court held that as for the Virginia St. Station, Respondent Singh was liable for the following violations of 329 IAC 9-7-2(1) and (2): failure to complete monthly leak detection at any time, failure to complete annual product line tightness testing in 2006 and 2007, and failure to complete annual automatic line leak detection testing in 2006 and 2007. Inspection reports indicated that Respondent Singh did not maintain any tank documentation at the Station, nor did he provide it to IDEM upon request, as required by 329 IAC 9-3-1(c)(3) and (d). *IDEM Exs. I, J, and O, Inspection Reports and Affidavit of Robert Strimbu*. Although Respondent Singh provided IDEM with a Midwest Tank Testing report dated March 24, 2008, documenting in 2008 annual testing of the automatic line leak detection and annual line tightness testing, he did not provide evidence that monthly release detection on the tanks was performed pursuant to 329 IAC 9-7-2 (1) or that automatic line leak detection and annual line tightness testing was performed in 2006 or 2007. *See IDEM Ex. L, Midwest Tank Testing Report*.
7. IDEM’s Commissioner’s Orders issued to Respondent Singh on May 21, 2009 required that he comply with applicable law by beginning to using a form of release detection at each Station that complies with all of the requirements of 329 IAC 9-7-2(1) and by submitting copies of all monitoring results to IDEM. With regard to the 15th Ave. Station, the Commissioner’s Order also required that Respondent Singh perform tank and line tightness testing on the UST systems at the site, pursuant to 329 IAC 9-7-2(2).
8. Testimony presented by both parties provided substantial evidence that Respondent Singh performed some of the required annual tightness testing for 2008, and that annual tightness testing showed acceptable results. Respondent Singh further testified that he relied upon the consulting firm he engaged to perform annual tests. Respondent Singh stated an intent to install Automatic Tank Gauging (“ATG”) systems at both stations within 60 days of a final order from this Court.
9. The Court’s February 2, 2010 Findings of Fact, Conclusions of Law and Order on summary judgment are incorporated herein. In sum, the Order provided that Respondent Singh must comply with 329 IAC 9-7-2 in all respects at both Stations.

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10. As the Court concluded, Respondent Singh violated Indiana underground storage tank rules established in 329 IAC 9. Consequently, this Court held that Respondent Singh is subject to civil penalties for these violations. The Court’s summary judgment order held that any civil penalty was to be calculated per the presiding Environmental Law Judge’s *de novo* review.
11. Final hearing was conducted on February 4, 2010, on the sole issue of the amount of civil penalty to be assessed at the two facilities. As part of its Motion for Summary Judgment, IDEM offered an Affidavit of Kris Mangold, Site Case Manager, which described the method IDEM used to calculate the civil penalty pursuant to the Penalty Policy for Underground Storage Tank / Leaking Underground Storage Tank Requirements. *IDEM Exs. P, R*³. Case Manager Mangold’s civil penalty calculation merged the two violations for each of the two sites into a single penalty calculation: failure to provide release detection on all tanks and failure to provide product line tightness testing.
12. IDEM’s Mangold based the penalty on a moderate potential for harm and a major extent of deviation from the applicable regulatory rules. The rationale for determining that the violations constitute a moderate potential for harm was that failure to complete annual testing could result in failing to detect equipment problems that could lead to a release of fuel product, which, if released, would cause harm to the environment. *IDEM Ex. P, see line IA*. The rationale for determining that the violations constitute a major extent of deviation from the rule was that no documentation was available at either Station or upon issuance of the NOV. *IDEM Ex. P, see line IB*. IDEM applied the Civil Penalty matrix midpoint for moderate potential for harm and major deviation to calculate a matrix penalty for each station of Four Thousand Five Hundred Dollars (\$4,500). *IDEM Ex. P, see line IC*.
13. IDEM determined that 2 violation days were appropriate to determine that a multiplier of 2 applied in calculating the civil penalty. *IDEM Ex. P, line ID*. The 2 days of violations were documented during two inspections, dated October 2, 2006 and October 3, 2007. Although substantial evidence was provided that tank tightness testing was performed as required in 2008, no such evidence was provided for 2006 and 2007. Documentation of the violations during two inspections over a year apart provides substantial evidence that the two Stations continued in noncompliance for more than 365 days. Per the Penalty Policy for Underground Storage Tank / Leaking Underground Storage Tank Requirements, Sec. II, *IDEM Exs. P, R*, observance of the two violations more than 365 days apart provides substantial evidence that two violation days should serve as a multiplier of the base civil penalty calculation.

³ 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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14. IDEM’s civil penalty calculation was based on attributing two tanks for each station, although inspection reports for the Virginia St. Station show three tanks. *IDEM Exs. I, J, see Ex. P, line IE.*
15. Based on calculations conducted per the Penalty Policy for Underground Storage Tank / Leaking Storage Tank Requirements, IDEM’s Mangold calculated a base civil penalty of Eighteen Thousand Dollars (\$18,000) for each of the two Stations. *IDEM Ex. P, see line IF.*
16. In its March 8, 2010 Post Hearing Brief and Proposed Findings of Fact, Conclusions of Law and Order, IDEM sought assessment of economic benefit of \$1616.30 per station. At Final Hearing, Respondent Singh presented substantial evidence that automatic tank gauging would cost \$7,000 to \$8,000 for each station. *Tr., p. 58.* IDEM elected to base its requested relief on the cost of monthly leak detection, and did not consider savings Respondent Singh realized by not completing required annual line and tank tightness testing. Per the Civil Penalty Policy, delayed costs may be equated to capital costs; the economic benefit for delayed costs includes the amount of interest on the unspent funds which could reasonably have been earned by the violator during noncompliance. IDEM calculated an economic benefit of \$1616.30 for each station based on:
 - A. principal: \$7,500, based on an average delayed cost of \$7,500 ($\$7,000 + \$8,000 = \$15,000$, divided by the two range values);
 - B. time: calculations starting with discovery of the violations during the October, 2006 inspections;
 - C. interest rate: 5% rate of return, based on risk-free interest rate stated for 30-year Treasury Bill interest rates available in October, 2006, as stated on the U.S. Treasury’s website.
17. In its March 8, 2010 Post Hearing Brief and Proposed Findings of Fact, Conclusions of Law and Order, IDEM sought to increase the base civil penalty by 50%, from \$18,000 to \$27,000 per station, based on aggravating factors which permit an upward adjustment to the base civil penalty, per the Civil Penalty Policy. IDEM identifies the following adjustment factors:
 - a. Respondent Singh’s actions before the violations: Respondent Singh controlled each station’s monthly leak detection and annual line and tank tightness testing, and showed his lessees “everything” concerning their station operation activities. *Tr., p. 47.* From his work with UST facilities since 1998, Respondent Singh had notice of applicable regulations.
 - b. Respondent Singh’s actions after IDEM alleged the violations: The stations remain in noncompliance since 2008. After the violations were issued, Respondent Singh invested in another UST station, showing economic ability to bring these two stations to compliance, shows willing noncompliance, lack of good faith effort to bring the violating stations into compliance, and the economic ability to do so.

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18. At Final Hearing, Respondent Singh testified that, despite efforts, he was not able to locate records in support of his Petition for Administrative Review. In his Post-Hearing Brief on Civil Penalty and Statement as to Proposed Findings of Fact and Conclusions of Law, Respondent Singh stated that he elected not to contest IDEM’s findings of violation, based on his inability to locate relevant records. By substantial evidence, Respondent Singh is not contesting IDEM’s findings of violation.

19. In seeking to lower or eliminate assessment of a civil penalty, Respondent Singh provided substantial evidence that the two stations do not perform well financially. They sell 10,000 – 15,000 gallons of gas per month. *Tr. p. 26.* County property taxes have increased from approximately \$5,000 per station to \$25,000 per station, in excess of their rental income. *Id.* The tenants are not always able to pay the rent. The stations are in neighborhoods with high crime rates. One of the tenant’s employees was murdered at work. “Although Singh has repeatedly instructed tenants to perform manual tank level gauging (with a measuring stick), the tenants and their employees are simply afraid to leave the safety of the building any more than necessary.” *Respondent Singh’s Post-Hearing Brief on Civil Penalty and Statement as to Proposed Findings of Fact, Conclusions of Law, p. 8.* Respondent Singh has not increased compliance efforts, such as installing ATG systems earlier, due to the costs and time demands of other legal matters, some related to other gas stations he owns or operates. Respondent Singh keeps the stations open only to fulfill lease obligations and to provide the tenants’ families with some means of support. Respondent Singh argued that by not forcing an evidentiary hearing on the substance of this case, economies to IDEM and the Court should serve to mitigate the amount of civil penalty. Respondent Singh argued that the cost of compliance in lieu of imposing a civil penalty would be within his means and would fulfill the purposes of Indiana’s environmental enforcement laws.

20. Respondent Singh did not provide IDEM or the Court further evidence of his inability to pay the civil penalties, such as tax returns or corporate financial statements.

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 I.C. § 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. § 4-21.4-3-27. 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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3. This Court 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), *Indiana-Kentucky Electric v. Commissioner, Indiana Department of Environmental Management*, 820 N.E.2d 771 (Ind. Ct. App. 2005). Findings of fact must be based exclusively on the evidence presented to the ELJ. I.C. § 4-21.5-3-27(d). Deference to the agency’s initial determination is not allowed. *Id.* “*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, 253 (Ind. Ct. App. 1981).
4. OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Envntl. Adjud.*, 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). “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 123, 129. *See also Blue River Valley*, 2005 OEA 1, 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. As ordered on summary judgment, IDEM met its the burden of showing, by substantial evidence, that Singh is liable for civil penalties at the 15th Ave. Station for failure to complete monthly leak detection at any time, failure to install automatic product line leak detection on the regular unleaded tank, failure to complete annual product line tightness testing in 2006, and failure to complete annual automatic line leak detection testing in 2006, and at the Virginia Street Station for failure to complete monthly leak detection at any time, failure to complete annual product line tightness testing in 2006 and 2007, and failure to complete annual automatic line leak detection testing in 2006 and 2007, all in violation of 329 IAC 9-7-2(1) and 329 IAC 9-7-2(2).
6. Respondent Singh is subject to civil penalties for violating Indiana’s underground storage tank laws. “A person who violates a rule adopted under I.C. § 13-23-1-2 . . . is subject to a civil penalty of not more than ten thousand dollars (\$10,000) per underground storage tank for each day of violation.” I.C. § 13-23-14-2, -3. 329 IAC 9, *et seq.*, was adopted per I.C. § 13-23-1-2. Singh violated underground storage tank rules stated in 329 IAC 9, *et seq.*, and is therefore subject to civil penalties for the violations. Civil penalty calculation should fulfill “the stated purpose of the Environmental Management Act . . . ‘to preserve, protect, and

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enforce the quality of the environment so that, to the extent possible, future generations will be ensured clean air, clean water, and a healthful environment.” *IDEM v. Medical Disposal Services, Inc.*, 729 N.E.2d 577, 582 (Ind. 2000).

7. IDEM’s Civil Penalty Policy Non-rule Policy Document (Doc. 99-0002-NPD)⁴ and the UST/LUST Civil Penalty Policy (Doc. 99-0001-NPD), *Exs. G, N, P*, are reasonable means of determining the civil penalty because they allows for predictable, consistent and fair calculation of penalties. *Commissioner, Ind. Dep’t of Env’tl Mgmt. v. Carson Stripping, Inc. and Carson Laser, Inc.*, 2004 OEA 14, 26, *citing Ind. Dep’t of Env’tl Mgmt. v. Schnippel Construction, Inc.*, 778 N.E.2d 407, 416 (Ind. Ct. App. 2002), *trans. den.* (affirming an administrative law judge’s penalty calculation because the calculation was based on IDEM’s written penalty policy). The two policies are applied together in violation cases involving UST/LUST matters. *Commissioner, Ind. Dep’t of Env’tl Mgmt. v. McClure Oil Corp.*, 2009 OEA 126, 129. UST civil penalty calculations are based on a review of each involved underground storage tank for each day of violation. I.C. § 13-23-14-2, -3. The civil penalty sought by IDEM was based on Respondent Singh’s moderate deviation from the rules and major risk for the potential harm, on the fact that the violations were documented over multiple inspections, and on four tanks: two tanks at the 15th Ave. Station and IDEM’s election of two tanks in operation at the Virginia St. Station, instead of the three tanks listed on the inspection reports. *IDEM Exs. I, J, P*. For each of the tanks, IDEM determined a moderate degree of deviation from the rule and a major potential for harm. Per the UST/LUST Penalty Policy, Sec. II, violations continuing for longer than 365 days to a day for each year, in this instance, two days for each station. *IDEM Exs. P, R*. Each of the stations were assigned a penalty amount and were assigned two “violation days”, accounting for the total \$36,000 penalty. *IDEM Ex. P*. Post-hearing, IDEM sought to increase the total penalty to \$57,232.60, for Respondent Singh’s actions before and after the violation, and for economic benefit. These amounts do not result in a penalty exceeding the statutory maximum of \$10,000 per tank per day.
8. The record in this cause contains substantial evidence for the Court to apply the Civil Penalty Policies to determine the appropriate penalty in this matter. According to the policies, 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.

⁴ IDEM’s Civil Penalty Policy, ID No. Enforcement 99-0002-NPD, and its UST/LUST Civil Penalty Policy ID No. Enforcement 99-0001-NPD, *IDEM Ex. R*, were both originally adopted on April 5, 1999 in accordance with I.C. § 13-14-1-11.5. As both apply to the violations in this cause, they will be referred to collectively as the “civil penalty policies.”

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9. The policies state that the potential for harm may be determined by considering “the likelihood and degree of exposure of person 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. OEA allocation of potential for harm, for extent of deviation, and for the matrix range point, is fact-sensitive. For example, in *McClure Oil*, 2009 OEA 126, a petroleum release from an UST was deemed a minor potential for harm, based on lack of evidence that the release had migrated off-site. In *Landers*, 2009 OEA 109, violations based on a large quantity of construction waste were deemed to constitute a moderate extent of deviation, and the penalty was selected from middle of the matrix range. In *Scherb*, 2006 OEA 16, violations based on a manure spill from a confined feeding operation into a stream resulted in moderate/moderate, and the lowest matrix amount was selected. In *IDEM v. Great Barrier Insulation Co.*, 2005 OEA 57, violations based on asbestos containment on removal with a low possibility of human or environmental contact and little adverse effect to the program, the Court selected minor potential for harm and a minor deviation, with the lowest point in the matrix applied.
10. For the violations of 329 IAC 9-7-2(1) and (2) at the four tanks at each of the two stations, the potential for harm is moderate. Much of the system subject to monitoring is not within view, as it is either underground or is covered. Without required periodic monitoring, reporting and annual testing, the only releases which would reasonably be detected would be from emergency or catastrophic causes. Equipment problems or more routine equipment failures would not be detected, allowing for releases of fuel products which would cause harm to the environment. Although it remains unknown whether the USTs have leaked, the 2007 and 2008 annual testing results showed the systems were sound. No evidence was presented that product migrated offsite, into drinking water or into the environment. But, the potential for harm in the event of a release is significant, as these stations are in highly populated urban areas, in the Great Lakes basin. The lack of documentation from periodic testing and reporting, in and of itself, creates no likelihood of exposure to harmful substances, but noncompliance with the testing and reporting requirement eliminates a reasonable opportunity for Respondent Singh or IDEM to determine whether equipment is operating properly or failing, and to respond appropriately.
11. The extent of deviation for the violations of 329 IAC 9-7-2 (1) and (2) is major. Required monitoring was not done manually by the tenants because they were fearful of going outside to conduct the manual tests in an area where a station worker had been shot and killed. Required monitoring was not done manually by any other entity. Required monitoring was not done through an automatic system, because the revenue generated by the stations in this case was not sufficient to pay for automatic systems, and Respondent Singh made the economic decision not to cover the cost from other funding sources, such as from profit from

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other stations he operated or from funds he used to acquire a new station. One of the two tanks at the 15th Ave. Station had no automatic line leak detection. The applicable requirements for performing and reporting required monitoring and testing contain no exception for the Court to apply. Little or no documentation was available at either Station. Annual testing of automatic line leak detection and annual line tightness testing were conducted for 2007 and 2008 at the 15th Ave. Station, and for 2008 at the Virginia St. Station. Other monitoring and documentation deficiencies were not cured during the litigation of this case. And, Respondent Singh offered to invest between \$7,000 and \$8,000 per station to install automatic leak detection only when sixty days passed after the Court issued a Final Order (in lieu of civil penalty). The extent of deviation from 329 IAC 9-7-2 (1) and (2) is major.

12. According to the Civil Penalty Policy, a value for each tank is selected from a selected cell “is left to the judgment of enforcement staff and is based on the individual circumstances of each case.” On *de novo* review of a case before the OEA, such judgment is to be exercised by the presiding environmental law judge (“ELJ”), to determine the base penalty. In this case, the circumstances show that Respondent Singh’s prior experience in the field of gas station/UST facility operations should have apprised him of the required testing and documentation deficiencies for his two Gary facilities. Although the dangers inherent from the facilities’ neighborhoods caused the tenants he trained to avoid manual monitoring out of fear, they were not so fearful as to continue their employment. Respondent Singh presented no testimony supporting the conclusion that the testing could not be done by someone else, even Respondent Singh. The two facilities experienced significant economic distress, such that their revenue did not pay for automatic testing and monitoring. However, Respondent Singh acquired another facility while this matter was pending. Further, he offered to pay to install automatic detection equipment in lieu of imposition civil penalty after entry of a Final Order. The Court recognizes that Respondent Singh’s resources were limited as he dealt with various distressing business challenges during the pendency of this case. In this case, Respondent Singh elected to make business decisions which gave greater support to Respondent Singh’s investments than to expenditures required for compliance with environmental regulations protective of the environment, public health and safety. An acceptance of Respondent Singh’s offer to apply penalty dollars to investment in automatic compliance equipment would reinforce these decisions, in contravention of the public health and safety purposes fulfilled by the applicable environmental regulations. Investment in ATG equipment is not mandated by law, although Respondent Singh has presented evidence supporting his decision to have automatic monitoring in lieu of manual testing. Therefore, the ELJ finds that the high end of the range for a UST violation of moderate potential for harm and major extent of deviation (“Moderate/Major”) is appropriate, resulting in a penalty of Five Thousand Dollars (\$5,000.00) per violation day, for each tank.

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13. The next step in civil penalty calculation is a determination of the days of noncompliance. IDEM investigations provide substantial evidence that monthly release detection required in 329 IAC 9-7-2(1) was observed on October 2, 2006 and October 3, 2007, a period extending beyond 365 days. Although monthly release detection might occur on one day per month, resulting in noncompliance for 12 days in a year, a review of the applicable regulations infers the intent to construe the monthly detection obligation as extending throughout the month and not limited to a particular day. Therefore, by substantial evidence, noncompliance for all four tanks extended beyond 365 days for monthly release detection. Noncompliance for annual testing required in 329 IAC 9-7-2(A)(i), (ii) occurred for one year for the 15th Ave. tanks, and two years for the Virginia St. tanks. It is reasonable to construe the annual testing requirement to be applied on an annual basis, without the obligation extending through a year. In this case, the Court elects to include its calculation of days of annual noncompliance within the days calculated for failure to conduct monthly release detection (somewhat akin to concurrent, versus consecutive, sentencing done by in misdemeanor and felony sentencing). The UST Civil Penalty Policy provides a multiplier of two (2) for over 365 days of noncompliance, for a base civil penalty of Ten Thousand Dollars (\$10,000.00) for each of the two tanks at the two facilities.
14. IDEM’s civil penalty calculation was based on attributing two tanks for each station, although inspection reports for the Virginia St. Station show three tanks. Substantial evidence did not support a finding that the violations did or did not apply to the Virginia St. Station’s third tank. Without substantial evidence that the third Virginia St. Station was in violation, the Court may not extend civil penalties to Respondent Singh for the Virginia St. Station’s third tank. By substantial evidence, the four tanks (two tanks at each station) are subject to the base civil penalty of \$10,000, for a base civil penalty for each tank of \$10,000.
15. The base civil penalty value may be adjusted by aggravating or mitigating factors. The mitigating factor of “Quick Settlement” did not occur, as Respondent did not execute a settlement in this case. Although the parties urge the ELJ to find aggravating or mitigating factors to consider, substantial evidence does not support the factors presented to the ELJ. Respondent Singh’s testimony concerning the cost of ATG systems is presented in a context of some confusion about various expenses, and does not provide substantial evidence of the actual costs he is required to incur, which would then be extrapolated into interest which he may have earned on funds not spent on the ATG systems. Nor is an ATG system the sole means required by law, although Respondent Singh has failed to implement manual monitoring. The types of evidence of economic benefit, or of inability to pay, contemplated in the civil penalty policies would provide a better analytical base than the assertions offered by the parties. Neither party presented substantial evidence of economic benefit, inability to pay or aggravating or mitigating factors. For lack of substantial evidence, the Court finds no further adjustment to the base civil penalty.

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16. Respondent Baldev “Dave” Singh, d/b/a Marathon Gas Stations at 3118 West 15th Avenue and at 2100 Virginia Street, Gary, Lake County, Indiana is assessed a total civil penalty of Forty Thousand Dollars (\$40,000) for the violations of 329 IAC 9-7-2(1) and 329 IAC 9-7-2(2), as adopted per I.C. § 13-23-1-2, and the May 21, 2009 Commissioner’s Order is sustained in all other respects.
17. Concerning the May 21, 2009 Commissioner’s Orders’ requirements for Respondent Singh to perform tank and line testing on the UST systems at both Stations, this testing is to be coordinated with IDEM personnel present, and copies of the testing results are to be submitted to IDEM within fifteen days of completion.
18. Within thirty days of this Order, Respondent Singh is to begin using a form of monthly release detection that complies with all of the requirements of 329 IAC 9-7-2(1). Respondent Singh shall submit documentation of all monthly release detection monitoring results to IDEM for twelve months after the date of this Order.

FINAL ORDER

For all of the foregoing reasons, **IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that the Respondent, Baldev “Dave” Singh, d/b/a Marathon Gas Stations at 3118 West 15th Avenue and at 2100 Virginia Street, Gary, Lake County, Indiana, violated 329 IAC 9-7-2(1) and 329 IAC 9-7-2(2). Respondent, Baldev “Dave” Singh is subject to civil penalties of Forty Thousand Dollars (\$40,000) for violating Indiana’s environmental management laws. Except for the amount of civil penalty, the Indiana Department of Environmental Management’s May 21, 2009 Commissioner’s Order is **AFFIRMED**. Tank and line testing on the UST systems at both Stations is to be coordinated with IDEM personnel present, and copies of the testing results are to be submitted to IDEM within fifteen days of completion. Within thirty days of this Order, Respondent Singh is to begin using a form of monthly release detection that complies with all of the requirements of 329 IAC 9-7-2(1), and shall submit documentation of all monthly release detection monitoring results to IDEM for twelve months after the date of this Order.

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. A party is eligible to seek Judicial Review of this Final Order as stated in applicable provisions of I.C. § 4-21.5, *et seq.* 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.

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IT IS SO ORDERED in Indianapolis, Indiana this 11th day of April, 2011.

Hon. Mary L. Davidsen
Chief Environmental Law Judge