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| STATE OF INDIANA | ) | MORGAN COUNTY _____ COURT |
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| COUNTY OF MORGAN | ) | CAUSE NO. **55C01-2503-RA-000691** |

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| HOOSIER ENVIRONMENTAL COUNCIL, Petitioner, | ) |
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| INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT; and INDIANOPLIS POWER & LIGHT COMPANY d/b/a AES INDIANA-EAGLE VALLEY GENERATING STATION, Respondents. | ) |

**VERIFIED PETITION FOR JUDICIAL REVIEW**

Petitioner, the Hoosier Environmental Council ("HEC"), by counsel, and pursuant to Indiana Code § 4-21.5-5 *et seq.,* petitions the Court for judicial review of the Indiana Office of Administrative Law Proceedings' ("OALP") Findings of Fact, Conclusions of Law and Final Order of February 18, 2025, in the matter of *Objection to the Issuance of National Pollution Discharge Elimination System Permit No. IN0004693 to AES Indiana-Eagle Valley Generating Station, Martinsville, Morgan County, Indiana,* OALP Cause No. IDEM-2304-002842 ("OALP's Final Order"). The OALP's Final Order makes final two other dispositive rulings in this case for which HEC seeks this Court's review; namely, the OALP's Order Denying Petitioner's Cross Motion for Summary Judgment on Associational Standing of November 13, 2024 ("Order Denying HEC's Cross-Motion on Standing"), and the former Office of Environmental Adjudication's[1] Findings of Fact, Conclusions of Law and Non-Final Order for IDEM and IPL d/b/a AES Indiana Eagle Valley Generating Station's Motions to Dismiss of October 30, 2023, in OEA Cause No. 23 W-J 5247 ("OALP Dismissal Order").

[1] HEC filed the underlying administrative appeal with the OEA. During the pendency of the proceeding, the Indiana General Assembly passed a law eliminating the OEA and transferring its pending cases, including this one, to the OALP. *See* 2024 Ind. HEA 1003.

In accordance with Indiana Code § 4-21.5-5-7(b)(3) these dispositive rulings (collectively, the "OALP's Final Ruling"), are submitted with this Verified Petition as Exhibits A, B and C. Pursuant to Indiana Code § 4-21.5-5-14, HEC respectfully requests the Court to set aside the OALP's Final Ruling as arbitrary and capricious, an abuse of discretion, contrary to law and procedure, and unsupported by a preponderance of the evidence. In support, HEC states as follows:

**Introduction**

Indiana courts are no longer required to give deference to state agencies that abuse their administrative power at the expense of everyday Hoosiers[2] as the Indiana Department of Environmental Management ("IDEM") and the OALP did in this case. Indeed, IDEM issued a water pollution permit that allows a power plant to discharge untreated wastewater laden with neurotoxins, carcinogens, and poisons from its leaching coal ash waste ponds into a stretch of the West Fork of the White River upstream of the City of Martinsville's municipal wells that supply the City's drinking water. IDEM did so in violation of federal and state clean water laws and the federal rule that governs the proper disposal of coal ash to protect human health and the environment from precisely this sort of toxic risk.

For its part, the OALP rubber-stamped IDEM's unlawful permitting decision leaving unabated a serious threat to the safety of Martinsville's drinking water. In doing so, the OALP ignored the law and evidence, disregarded procedural rules, and trampled on the rights of Hoosiers to obtain fair, impartial, and independent administrative review of IDEM's decisions, which is the

[2] 2024 Ind. HEA 1003, Sec. 12 (amending Ind. Code § 4-21.5-5-11); Goldwater Institute, *Victory! Indiana Ends Judicial Deference to Unelected Government Bureaucrats* (Mar. 14, 2024) at https://www.goldwaterinstitute.org/victory-indiana-ends-judicial-deference-to-unelected-government-bureaucrats/; Pacific Legal Foundation, *The Center Square: Greater Government Accountability Comes to Indiana* (Apr. 22, 2024) at https://pacificlegal.org/the-center-square-greater-government-accountability-comes-to-indiana/.

only legal recourse they have when those decisions adversely affect their interests. For the reasons detailed below, this Court should not allow it.

## I. Name and Mailing Address of Petitioner (Ind. Code § 4-21.5-5-7(b)(1))

Hoosier Environmental Council
3951 North Meridian Street, Suite 100
Indianapolis, Indiana 46208

## II. Name and Mailing Address of the Agency Whose Action is at Issue (Ind. Code § 4-21.5-5-7(b)(2))

Indiana Office of Administrative Law Proceedings
100 North Senate Avenue, N-802
Indianapolis, Indiana 46204

Indiana Department of Environmental Management
Indiana Government Center North
100 North Senate Avenue
Indianapolis, Indiana 46204

## III. Identification of the Agency Action at Issue, Together With a Copy, Summary, or Brief Description of the Agency Action (Ind. Code § 4-21.5-5-7(b)(3))

1. This matter stems from a National Pollutant Discharge Elimination System Permit that IDEM issued on March 21, 2023 ("NPDES Permit") to Indianapolis Power & Light d/b/a AES Indiana ("AESI") for its power plant in Martinsville, known as the Eagle Valley Generating Station ("Eagle Valley").

2. Eagle Valley began operating in 1949 as a coal-fired powerplant, which AESI decommissioned in 2016 and replaced with a natural gas plant in 2018. During its 70-year history as a coal-fired plant, Eagle Valley generated millions of tons of coal combustion waste (also known as "coal ash," "coal combustion residuals," or "CCR"), which is a by-product of burning coal.

3. Coal ash is well-known to contain dangerous carcinogens, neurotoxins and poisons including arsenic, boron, cadmium, hexavalent chromium, lead, lithium, mercury, molybdenum, selenium, and thallium. EPA, *Hazardous and Solid Waste Management System; Identification and*

*Listing of Special Wastes; Disposal of Coal Combustion Residuals From Electric Utilities; Proposed Rule,* 75 Fed. Reg. 35,128 at 35,137-35,140, 35,153, 35,167-35,172 (June 21, 2010); EPA, *Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals From Electric Utilities; Final Rule,* 80 Fed. Reg. 21,301 at 80 FR 21,311, 21,325-21,327 (Apr. 17, 2015).

4. Even so, disposal of this toxic waste was largely unregulated in the U.S. until 2015 when the EPA promulgated the CCR Rule. 80 FR 21,302, 21,322-21,325. Before then, the favored industry practice—as it was at Eagle Valley—was to mix the waste with water for transport and dumping into large, unlined surface impoundments or "ponds." 80 FR 21,302, 21,303, 21,324.

5. Indiana has more coal ash ponds than any other state in the nation. EPA, *Regulatory Impact Analysis (RIA) for EPA's 2015 Coal Combustion Residuals (CCR) Final Rule*, Docket ID No. EPA-HQ-RCRA-2009-0640-12034 at 2-26, Exhibit 3-D (Dec. 2014). And many of these waste ponds—like those at Eagle Valley—are sitting in the floodplains of Indiana's major rivers.[3]

6. Indeed, the ash ponds at Eagle Valley span for more than fifty acres just west of the power plant and are estimated to contain at least 830 acre-feet of coal ash.[4] These unlined waste ponds sit next to the West Fork of the White River, within the river's floodplain, and are carved into the earth at depths just directly above, and in some areas within, the shallow sand and gravel groundwater system that adjoins the river.[5]

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[3] Sarah Bowman, *Other States are Making Utilities Dig Up Toxic Coal Ash. Indiana is Letting it Sit There,* Indianapolis Star (Feb. 10, 2021) available at https://www.indystar.com/story/news/environment/2021/02/10/other-states-more-protective-than-indiana-toxic-coal-ash/6657744002/.

[4] AESI October 2022 Closure Plan for Ponds A, B, & C at pdf pp. 34, 54, 177, 353.

[5] Oct. 2022 Closure Plan at pdf pp. 620-650, 751.

7. Due to decades of leaching from the coal ash waste in these ponds into the uppermost aquifer, and in some places coming into direct contact with the aquifer, contamination of area groundwater with toxic coal ash constituents is ongoing. Eagle Valley's annual groundwater monitoring reports consistently confirm elevated levels of coal ash contaminants including arsenic, lithium, and molybdenum, above Groundwater Protection Standards ("GWPS"), and that contamination plume has migrated off-site.[6]

8. To address this, AESI is required by the CCR Rule to "immediately take all necessary measures to control the source(s) of releases so as to *reduce or eliminate, to the maximum extent feasible, further releases of [coal ash] contaminants into the environment."* 40 C.F.R. § 257.90(d) (emphasis added). And any corrective measure taken must be designed to, among other things: "(1) [b]e protective of human health and the environment; (2) [a]ttain the groundwater protection standards as specified pursuant to §257.95(h); and (3) [c]ontrol the source(s) of releases so as to reduce or eliminate, to the maximum extent feasible, further releases of constituents in appendix IV to [the CCR Rule] into the environment." 40 CFR § 257.97(b).

9. In addition, AESI must close Eagle Valley's coal ash ponds by either: (a) clean closure, which involves "removing and decontaminating all areas affected by releases" from the coal ash ponds; or (b) through closure-in-place, "ensur[ing] that, at a minimum, the CCR unit is closed in a manner that will *control, minimize or eliminate, to the maximum extent feasible*, post-closure infiltration of liquids into the waste and *releases of CCR, leachate, or contaminated run-*

[6] AESI's 2022 Groundwater Monitoring and Corrective Action Report at pdf p. 6 (confirming "groundwater concentrations [of coal ash contaminants] above applicable GWPSs were present at off-site Barnard Farms, Beecham-Dillon Farms and Cragen properties"); AESI's April 2024 Report on Updated Corrective Measures Assessment for Eagle Valley, pp. 4-5 (confirming the ash ponds are "the source of arsenic, lithium, and molybdenum SSLs above GWPSs" and that the "affected groundwater was identified offsite").

*off to the ground or surface waters* or to the atmosphere." 40 CFR § 257.101(a)(1); 40 C.F.R. § 257.102 (c), (d) (emphasis added).

10. At the time IDEM issued the NPDES Permit, AESI's closure plan for Eagle Valley's waste ponds was (and still is) to leave the coal ash sitting in the White River floodplain forever.[7]

11. As for corrective measures, AESI's plan was (and still is) to "hydraulically control" the migration of contaminated groundwater from reaching the White River by continuously pumping it for use as cooling water in the powerplant's operations. As AESI explains it, Eagle Valley's high-capacity wells have reversed the groundwater flow away from the river such that the wells are effectively "capturing" and "containing" the coal ash contaminants so that they do not reach the river.[8]

12. The problem is that "capturing" the coal ash contaminants with the production wells is only part of the remedial process. The rest, actually "containing" them, depends on Eagle Valley's NPDES Permit, which requires no such thing. Instead, the NPDES Permit allows AESI to release the captured contaminants right back into the environment *without limit,* directly to the White River in violation of the CCR Rule.

13. As IDEM confirmed, the captured groundwater "is the source water for all processes at [Eagle Valley] and is provided by the production wells" that are located near the unlined coal ash ponds.[9] And that groundwater contains "pollutants historically contributed by coal ash" including antimony, arsenic, barium, beryllium, boron, cadmium, calcium, cobalt, hexavalent

[7] IDEM recently approved AESI's Closure Plan on January 10, 2025.
[8] *See* AESI's October 2019 Corrective Measures Assessment at pdf 12, 16-17, which was under consideration at the time IDEM issued the NPDES Permit; *See also* AESI's Updated Corrective Measures Assessment (April 5, 2024) at pdf 8, 27 that likewise contemplates use of the production wells to hydraulically contain 65% of contaminated groundwater from reaching the river.
[9] NPDES Permit at pdf pp. 79-80, 82-83.

chromium, lead, lithium, molybdenum, thallium, selenium, fluoride, radium 226 and 228, sulfate, and total dissolved solids. Even so, IDEM imposed no limits in the NPDES permit to control Eagle Valley's releases of these dangerous contaminants to the White River.[10]

14. For that matter, IDEM placed no limits on the coal ash contaminants that the agency identified as "probable or known human carcinogens" including arsenic, beryllium, cadmium, and lead that are present in Eagle Valley's discharges[11] As IDEM admitted, when it evaluated whether concentrations of these carcinogens may have a reasonable potential to exceed water quality standards, the agency did not consider the criteria that would provide an acceptable degree of protection to public health from cancer because the criteria are narrative, instead of numeric.[12]

15. Not only that, but IDEM placed no limits on Eagle Valley's ongoing releases of coal ash contaminants to the river even though the power plant has a water treatment system in place that could be used to prevent this. Eagle Valley has a reverse osmosis ("RO") system that is used to remove coal ash contaminants from the pumped groundwater before it is used as cooling water in the plant. However, instead of requiring AESI to properly dispose of that internal waste stream, the NPDES Permit allows AESI to put it right back into the spent cooling water, which is then discharged *untreated* to the river.[13]

16. As detailed below, this shell game of pumping and dumping is particularly concerning for HEC's members who live in the City of Martinsville. The City's municipal wells that supply residents' drinking water are in the White River floodplain downstream of Eagle Valley.

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[10] NPDES Permit at pdf pp. 79-80, 82-83 (requiring only "monitoring" for the coal ash pollutants).
[11] NPDES Permit at pdf pp. 126-127; IDEM Answers to HEC's Request to Admit Facts 1-7.
[12] IDEM Answers to Interrogatories 5, 6 and 7 (explaining IDEM "did not conduct a reasonable potential to exceed human cancer criteria analysis" because "327 IAC 2-1-6 does not include numeric human health cancer criteria."); NPDES Permit at pdf pp. 126-127.
[13] NPDES Permit at pdf pp. 72-73; October 2019 Corrective Measures Assessment at pdf p. 24.

And while the City's water utility treats the water for many pollutants, it does not test or treat for many of the coal ash contaminants that are in Eagle Valley's wastewater discharges. According to the sworn affidavits of two highly qualified experts in the fields of hydrogeology and environmental health and toxicology, these ongoing discharges threaten the safety of the City's drinking water and pose serious health risks to people who rely on that water, including HEC's members. *Infra* at pp. 30-37.

17. Based on these and other concerns, HEC sought administrative review of the NPDES Permit under on behalf of its members who live in Martinsville under the doctrine of associational standing—a doctrine that has long been recognized in Indiana as applicable to administrative proceedings brought under the Administrative Orders and Procedures Act ("AOPA"). *See Save the Valley, Inc. v. Indiana-Kentucky Elec. Corp.,* 820 N.E.2d 677, 682 (Ind. Ct. App. 2005); *see also Objection to the Issuance of Closure/Post Closure Plan Re Tanners Creek Fly Ash Pond, Tanners Creek Development, LLC,* 2023 OEA 027, *054-058.

18. On April 17, 2023, HEC filed its Petition for Administrative Review, which HEC amended on July 5, 2023, asking the OALP to revoke the NPDES Permit for: (1) failing to require AESI to properly dispose of the internal waste stream laden with coal ash contaminants removed from the pumped groundwater in violation of the CCR Rule and the Clean Water Act ("CWA"); (2) failure to meet the CWA's antidegradation requirements; (3) lacking appropriate mercury limits and monitoring requirements to ensure Indiana's water quality criterion for mercury is met in violation of the CWA; and (4) failing to assess whether levels carcinogens in Eagle Valley's discharges have a reasonable potential to exceed human health cancer criteria contrary to the CWA.

19. Over the course of the proceeding, including briefing on AESI and IDEM's motions to dismiss claims 1 and 2, and the Parties' cross-motions for summary judgment on the issue of

HEC's associational standing and claims 3 and 4, HEC supported its claims with extensive legal authority and undisputed, credible evidence that the OALP largely ignored.

20. For instance, despite undisputed expert testimony that the safety of HEC members' drinking water is threatened by Eagle Valley's uncontrolled releases of coal ash contaminants to the White River, the OALP held that HEC lacks associational standing because its members have not manifested personal injuries. OALP Final Order, Exh. C at 7.

21. This overlooks the fact that the very purpose of environmental permits like the NPDES Permit is to protect human health and the environment so that people do not suffer injury or illness. *See e.g.,* Ind. Code § 13-12-3-1(3).

22. More importantly, the OALP's conclusion flies in the face of long-standing Indiana precedent on who may seek administrative review of IDEM's permitting decisions, which does not require evidence of personal injury, illness, or harm. *See Huffman v. Ind. Office of Envtl. Adjudication,* 811 N.E.2d 806, 815-816 (Ind. 2004).

23. As presented below, the OALP's rulings on the merits of HEC's claims are similarly flawed. In granting AESI and IDEM's motions to dismiss and for summary judgment, the OALP failed to engage in any meaningful way with HEC's pleading allegations, arguments, and evidence, contrary to the standards of review under Indiana Trial Rules 12(B)(6) and 56. Instead, the OALP adopted AESI and IDEM's arguments nearly verbatim on literally every claim and issue—a fact that should raise a red flag for this Court. *See Redd v. Redd,* 901 N.E.2d 545, 549 (Ind. Ct. App. 2009) (when a court adopts a party's arguments verbatim it "weakens our confidence as an appellate court that the findings are the result of considered judgment.")

24. For that matter, each of the OALP's three dispositive orders that make up its Final Ruling are so one-sided in favor of IDEM and AESI as to give the unmistakable impression that the OALP did not act fairly, independently, or impartially in this case.

25. If allowed to stand, the OALP's Final Ruling will leave unabated a serious threat to the safety of Martinsville's drinking water and effectively turn the OALP into nothing more than a rubber stamp for IDEM's decisions. HEC seeks judicial review of that unlawful Final Ruling.

## IV. Identification of Persons Who Were Parties in Any Proceedings That Led to the Agency Action (Ind. Code § 4-21.5-5-7(b)(4))

26. Petitioner HEC is located at 3951 North Meridian Street, Suite 100, Indianapolis, Indiana 46208. The following attorneys represented HEC before the OALP:

Kim Ferraro
Kacey Cook
Megan Freveletti
Conservation Law Center
116 South Indiana Avenue
Bloomington, Indiana 47408

27. Respondent IDEM is located at Indiana Government Center North, 100 North Senate Avenue, Indianapolis, Indiana 46204. Counsel below represented IDEM before the OALP:

Susanna A. Bingman
Mark Finley
IDEM, Office of Legal Counsel
100 North Senate Avenue, IGCN Rm. 1307
Indianapolis, Indiana 46204

28. Permittee/Respondent AESI by its Registered Agent, Joseph G. Strines, is located at One Monument Circle, Indianapolis, Indiana 46204. The following attorneys represented AESI before the OALP:

Michael T. Scanlon
E. Sean Griggs
Jessica L. Reiss
Barnes & Thornburg, LLP

11 South Meridian Street
Indianapolis, Indiana 46204

## V. Specific Facts to Demonstrate That the Petitioner is Entitled to Obtain Judicial Review Under Ind. Code § 4-21.5-5-2 (Ind. Code § 4-21.5-5-7(b)(5))

29. HEC is entitled to judicial review of the OALP's Final Ruling under Indiana Code § 4 21.5-5-2 for the following reasons:

30. HEC has standing to seek the Court's judicial review under Indiana Code § 4-21.5-5-3(a)(2) because HEC was a party to the proceeding that led to the OALP's Final Ruling.

31. HEC has exhausted all administrative remedies as required by Indiana Code § 4-21.5-5-4 for challenging the NPDES Permit that IDEM issued for Eagle Valley. The OALP is the ultimate authority for administrative review of IDEM's decisions. Ind. Code § 4-21.5-1-15; Ind. Code § 4-15-10.5-12. The OALP's Final Order of February 18, 2025, is the final agency action in this case. Ind. Code § 4-21.5-3-27(a). *See also* OALP's Final Order, Exh. C at 13 (designating the Order as a "Final Order subject to judicial review"). Therefore, the OALP's Final Order is subject to judicial review along with the OALP's Dismissal Order, and Order Denying HEC's Cross-Motion on Standing that were made final by the OALP Final Order. Ind. Code § 4-21.5-5, *et. seq.*

32. Venue is proper in this Court because Eagle Valley is located in this judicial district where the NPDES Permit issued by IDEM and upheld by the OALP's Final Ruling is to be carried out and enforced. Ind. Code § 4-21.5-5-6(a)(2).

33. In accordance with Indiana Code § 4-21.5-5-5, HEC timely filed this Verified Petition for Judicial Review within 30 days of February 18, 2025, the date the OALP issued its Final Order.

34. Within 30 days of HEC's service of this Verified Petition on the OALP, the agency "shall transmit to the court the original or a certified copy of the agency record for judicial review" as required by Indiana Code § 4-21.5-5-13.

## VI. Specific Facts to Demonstrate the Petitioner Has Been Prejudiced by One or More of the Grounds Described in Ind. Code § 4-21.5-5-14 (Ind. Code § 4-21.5-5-7(b)(6))

35. A court on judicial review shall set aside a state agency action that is: "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; or (5) unsupported by preponderance of the evidence." Ind. Code § 4-21.5-5-14.

36. Under this standard, the Court owes no deference to the legal conclusions and factual findings of the OALP. The Indiana legislature made this clear last year when it amended AOPA to end "*Chevron* deference" in Indiana[14] so that courts will provide a meaningful check on government agencies' exercise of their administrative power. 2024 Ind. HEA 1003.

37. Under the new law, the Court must "decide all questions of law . . . *without deference* to any previous interpretation made by the [OALP]" and is not bound by the agency's factual findings that must be supported by a "preponderance of the evidence," not merely "substantial evidence" as before.[15] 2024 Ind. HEA 1003, Sec. 12 and Sec. 14(d)(5) (amending Ind. Code § 4-21.5-5-11 and -14).

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[14] Indiana's new law is in line with the U.S. Supreme Court's decision to overturn *Chevron v. NRDC,* 467 U.S. 837 (1984), which required courts to defer to agencies' reasonable interpretations of statutes and rules, even if a court disagreed with the agency's interpretation. *Loper Bright Enters. v. Raimondo,* 603 U.S. 369 (2024).

[15] "Substantial evidence" is "more than a scintilla but *less than* a preponderance of evidence." *Ind. High Sch. Athletic Ass'n, Inc. v. Watson*, 938 N.E.2d 672, 680–81 (Ind. 2010) (emphasis added).

38. The Court's *de novo* review is critically needed to correct the OALP's abuse of its authority. As detailed below, the three dispositive rulings that make up the OALP's Final Ruling depend on ignoring relevant law, applicable standards of review, and material evidence. As such, the OALP's Final Ruling should be set aside by the Court as arbitrary and capricious, contrary to law and procedure, and unsupported by a preponderance of the evidence.

A. The OALP's Order of Dismissal is Contrary to Law and Procedure

39. The OALP's Order of Dismissal granted AESI and IDEM's motions to dismiss two of HEC's claims for failure to state a claim under; namely, HEC's claim that the NPDES Permit violates the CCR Rule and the CWA and claim that the Permit violates antidegradation standards. Exh. A at 4-6. In doing so, the OALP misstated HEC's pleading allegations and ignored relevant law, contrary to the applicable standard of review under TR 12(B)(6). When matters actually pled by HEC are considered in light of the relevant law and in HEC's favor, there is no question that HEC raised colorable claims for relief and the OALP's ruling otherwise was clear error.

*Standard of Review Under Indiana Trial Rule 12(B)(6)*

40. "A motion to dismiss under Rule 12(B)(6) tests the legal sufficiency of a complaint: that is, whether the allegations in the complaint establish any set of circumstances under which a plaintiff would be entitled to relief." *Anonymous Physician v. White,* 153 N.E.3d 272, 277 (Ind. Ct. App. 2020) (quoting *Trail v. Boys and Girls Clubs of Northwest Ind.*, 845 N.E.2d 130, 134 (Ind. 2006). "When reviewing a Trial Rule 12(B)(6) motion to dismiss, [the court] accept[s] the facts alleged in the complaint as true and view[s] the pleadings in a light most favorable to the nonmoving party and with every reasonable inference in the nonmoving party's favor." *Id.* "Thus, a complaint is sufficient if it states any set of allegations, no matter how unartfully pleaded, upon

which the trial court could . . . grant relief." *McQueen v. Fayette County Sch. Corp.,* 711 N.E.2d 62, 65 (Ind. Ct. App. 1999).

41. "A complaint that survives [this] limited scrutiny states a claim for relief, even if there may lurk on the horizon an unassailable defense" because the complaining party "need not anticipate [the defense] . . . and plead matters in avoidance in the complaint." *Bellwether Properties, LLC v. Duke Energy Indiana, Inc.,* 87 N.E.3d 462, 464, 466-467 (Ind. 2017). Stated differently, "[t]he court may only look to the complaint, and well-pleaded material must be taken as admitted." *McQueen,* 711 N.E.2d at 65.

42. Finally, Indiana courts "view[] motions to dismiss for failure to state a claim with disfavor because such motions undermine the policy of deciding causes of action on their merits." *McQueen,* 711 N.E.2d at 65. Accordingly, such dismissals are "rarely appropriate" and warranted only when "it appears to a certainty on the face of the complaint that the complaining party is not entitled to any relief." *Anonymous Physician,* 153 N.E.3d at 277. That is not the situation here and the OALP's erroneous conclusion otherwise should be reversed.

*The OALP Erred in Dismissing HEC's Claim the NPDES Permit Violates the CCR Rule and the CWA By Not Requiring Proper Disposal of the Internal Waste Stream Generated by RO Treatment of Coal Ash Contaminated Groundwater*

43. HEC's Amended Petition for Administrative Review ("Amended Petition") provides detailed fact allegations and discussion of relevant legal authorities to support HEC's claim that the NPDES Permit issued to Eagle Valley violates the CCR Rule and the CWA by not requiring AESI to properly dispose of the internal waste stream generated from the RO treatment process that removes coal ash contaminants from the pumped groundwater before it is used as process water in the plant.[16]

[16] Amended Petition at pp. 2-6, 15-17.

44. Adopting IDEM and AESI's arguments, the OALP seized on select quotes from two of HEC's pleading allegations, taken out of context, to conclude that "HEC's CCR contention does not identify the NPDES permit terms and conditions that, in the judgment of [HEC], would be appropriate . . . to satisfy the requirements of the law governing [NPDES] permits" and "does not claim AES' NPDES Permit fails to satisfy the requirements of any applicable NPDES law." Exh. A at 5, ¶8. This flatly ignores the allegations of HEC's Amended Petition.

45. Specifically, Paragraph 57 of HEC's Amended Petition alleges that the NPDES Permit violates the CWA and CCR Rule by not imposing a permit requirement for AESI to properly dispose of the internal waste stream:

> [IDEM] must modify the NPDES Permit issued to Eagle Valley to require actual 'containment' of CCR contaminants being pumped from the production wells and prohibit Eagle Valley from releasing those contaminants to the White River. *This can be achieved by imposing a permit requirement for Eagle Valley to properly dispose of the internal waste stream generated from the treatment process that removes the CCR contaminants from the pumped groundwater before it is used as cooling water in the plant.* Allowing Eagle Valley to add that waste back into the cooling water before it is discharged to the White River, as the NPDES Permit does, violates the CCR Rule and the CWA.[17]

46. In turn, Paragraph 56 of the Amended Petition identifies "applicable NPDES law" that gives IDEM the authority to impose this condition in Eagle Valley's NPDES Permit:

> [A] 'point source' under Indiana's NPDES permitting regulations is defined to include 'a well.' 327 IAC 2-1.3-2(37). In turn, a 'regulated pollutant' includes 'solid waste' that is 'discharged to water' and 'may be limited in an NPDES permit.' *Id.* (38), (43). And those permit limits, contrary to the view of IDEM's OWQ, may include requirements as appropriate to *measure, monitor, and limit pollutants in internal waste streams and intake water.* 40 CFR § 122.44(i)(1)(iii); 40 CFR § 122.45(h). They may also include 'any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations . . . or any other Federal law or regulation.' 33 U.S.C. § 1311(b)(1)(C); 327 IAC 5-2-10(a)(4)(c).[18]

[17] Amended Petition at ¶57 (emphasis added).
[18] Amended Petition at ¶56 (emphasis added).

47. Ignoring these allegations entirely, the OALP concluded that HEC "offers no cogent support for claiming that AES's permitted point source wastewater discharge would be subject to both the CCR Rule and the CWA . . . and thus did not provide operative facts necessary to set forth an actionable claim." Exh. A at 8, ¶17.

48. In support, the OALP goes on to mischaracterize HEC's arguments in response to IDEM and AESI's motions to dismiss as somehow "newly contend[ing] that AES' wastewater is regulated by both the CCR Rule and the CWA" and concludes that these "new contentions" are wrong because the CCR Rule "exempt[s] all industrial discharges which are point sources subject to NPDES permitting." Exh. A at 8, ¶17.[19]

49. But as HEC pointed out in response to IDEM's same argument,[20] the CCR Rule's exclusion for industrial wastewater discharges from point sources regulated under CWA Section 402 "applies only to the actual point source discharge" but "does not exclude industrial wastewaters while they are being collected, stored or treated *before discharge*, nor does it exclude sludges that are generated by industrial wastewater treatment." Indeed, 40 CFR § 261.4(a)(2) (emphasis added). In other words, the internal waste stream generated by Eagle Valley's RO treatment process is a "solid waste" under the Resource Conservation and Recovery Act ("RCRA") that is regulated by both the CCR Rule and the CWA.[21]

50. Indeed, a "solid waste" is considered a "regulated pollutant" under the CWA that "may be limited in a NPDES permit" through technology-based controls on internal waste streams. 327 IAC 2-1.3-2(38)(B), (43)(B); 33 U.S.C § 1311(b)(2)(A),(F); 40 CFR § 401.12(b),(c); 40 C.F.R

[19] IDEM Motion to Dismiss at 7, 10.
[20] HEC Combined Response to IDEM and AESI's Motions to Dismiss at 5.
[21] The CCR Rule was promulgated under EPA's authority to regulate coal ash as a solid waste under subtitle D of RCRA.

§ 125.3(g) (directing that technology-based effluent limits "shall be established . . . for solids, sludges, filter backwash, and other pollutants removed *in the course of treatment or control of wastewaters in the same manner as for other pollutants*" (emphasis added)).

51. The OALP's conclusion otherwise—that IDEM has no authority under the CWA to place limits on internal waste streams—simply ignores the plain language of these CWA and RCRA provisions.

52. Next the OALP concludes that HEC raised "new claims" in its response brief that "IDEM was required to use best professional judgment (BPJ) to derive effluent limitations based on best available control technology (BAT) which HEC believes would require proper disposal of CCR contaminants," but "offers no cogent support for its contention that IDEM did not exercise BPJ or that BAT applied to the combined wastestreams." Exh. A at 6, ¶13. There are two problems with this.

53. First, HEC did not raise "new claims." HEC arguments in this regard were in response to IDEM's insistence that it had no obligation under the CWA "to place internal permit limits on the [pumped] groundwater itself."[22] Second, HEC provided ample support by way of detailed explanation and citation to multiple legal authorities confirming that IDEM's insistence that it lacks such authority is categorically not true—IDEM is required to place BAT limits on Eagle Valley's *internal waste stream* to require proper disposal of the coal ash contaminants already being removed from the pumped groundwater by the existing RO technology.[23]

54. As HEC explained in its response brief, IDEM is required to place technology-based limits ("TBELS") on toxic priority pollutants, including the coal ash contaminants in Eagle

[22] IDEM Motion at 10.
[23] HEC Consolidated Response to AESI and IDEM's Motions to Dismiss at 6-9.

Valley's discharges, based on application of BAT, which should "reflect the amount of pollutant that would be discharged by a point source employing the best available technology" that is "economically feasible across the category or subcategory as a whole." *Sw. Elec. Power Co. v. United States EPA,* 920 F.3d 999, 1006 (5th Cir. 2019).

55. Those limits must be "based on the leading technology, regardless of the receiving water's quality." *Riverkeeper, Inc. v. United States EPA,* 358 F.3d 174, 184-85 (2nd Cir. 2004). And they typically include treatment requirements that are "*applied prior to* or at the point of discharge" including requirements for pollutants that are "*removed in the course of treatment* or control of wastewaters." 40 C.F.R. § 125.3(e),(g) (emphasis added).

56. As alleged in HEC's Amended Petition and reiterated in HEC's response brief, a feasible, available treatment technology that can remove the toxic coal ash pollutants from the effluent exists and is already being used at Eagle Valley to remove those pollutants from the groundwater as soon as it enters the plant. That means the appropriate BAT limits on the coal ash contaminants in Eagle Valley's discharges should be zero, or close to it, absent a determination by IDEM that proper disposal of those contaminants after removal is somehow unachievable "based on the performance of the single best-performing [natural gas] plant" in the industry. *Sw. Elec. Power Co.,* 920 F.3d at 1006; *see also* 40 C.F.R. § 125.3(e),(g); 40 C.F.R. § 122.44(e) (requiring technology-based controls of toxic pollutants that "may be discharged at a level greater than the level which can be achieved by the technology-based treatment requirements *appropriate to the permittee*." (emphasis added)).

57. IDEM made no such determination in this case. Nor did the OALP. Instead, IDEM confirmed that it exercised its "best professional judgment" in setting case-specific technology-based requirements for Eagle Valley's *combined waste streams at the point of discharge—i.e.,* after

the coal ash contaminants have been added back in.[24] And in doing so, IDEM applied the less stringent BPT limits ("best practicable control technology") for certain conventional pollutants, but did not apply BAT to ensure the coal ash contaminants—toxic priority pollutants—are not added back to the wastewater that Eagle Valley discharges to the White River.[25]

58. Thus, the OALP's summary conclusion that IDEM "included the appropriate TBELs in AES' Permit" (Exh. A at 7, ¶15) is not supported by the evidence.

59. But in any event, it is the factual allegations in HEC's Amended Petition that control here and must be taken as true. While IDEM and AESI clearly disagree that IDEM should have imposed a permitting requirement for AESI to properly dispose of the coal ash contaminants that are removed through RO treatment of the pumped groundwater, their disagreement is not enough to warrant the OALP's dismissal under TR 12(B)(6). The facts pled in HEC's Amended Petition taken as true, state a colorable claim under the CWA for which the OALP may grant relief.

60. The facts alleged in HEC's Amended Petition also state a viable claim under the CCR Rule. As HEC alleged, Eagle Valley's NPDES Permit is an integral part of the corrective measures that AESI says will "hydraulically capture" and "contain" coal ash contaminants from reaching the White River.[26] And according to AESI's corrective measures assessment, this "hydraulic containment" is intended to meet the CCR Rule's mandate to "reduce or eliminate, to the maximum extent feasible, further releases of [CCR] contaminants into the environment," including "releases of CCR . . . to the ground or surface waters."[27]

[24] NPDES Permit at pdf p. 95.
[25] NPDES Permit at pdf pp. 97-99.
[26] Amended Petition at ¶¶ 9-10.
[27] Amended Petition at ¶52 (citing 40 C.F.R. §§ 257.90(d); 257.102(d)).

61. Nonetheless, the OALP concluded that the CCR Rule has no relevance to IDEM's issuance of the NPDES Permit. Exh. A at 4-5. This is wrong for at least three reasons. First, all applicants for NPDES permits must provide information to the permitting agency regarding "all other relevant environmental permits, including State permits" and approvals that the applicant has "received or applied for." 40 CFR 122.21(f)(6). That would certainly include AESI's submissions for approval of its planned corrective measures under the CCR Rule.

62. Second, when imposing technology-based treatment requirements on a case-by-case basis, as IDEM did here, the agency must consider, among other factors: "[t]he appropriate technology for the category or class of point sources of which the applicant is a member, based upon all available information;" and "[a]ny unique factors relating to the applicant." 40 C.F.R. § 125.3(c). The fact that AESI has identified Eagle Valley's NPDES Permit as central to meeting its obligation to comply with the CCR Rule's corrective measures requirements presents a "unique factor" IDEM should have considered in issuing that NPDES Permit.

63. Third, and most critically, AESI's corrective measures assessment is available information that identifies the RO treatment system currently used at Eagle Valley to remove CCR contaminants from the pumped groundwater. It also describes that technology as capable of "treating thousands of gallons per minute of effluent" and "creat[ing] a secondary waste stream" that can be disposed of.[28] In other words, AESI's corrective measures assessment provides evidence of BAT that eliminates, or substantially reduces, the discharge of toxic pollutants as required by the CWA. It is also evidence of existing technology that can reduce or eliminate to the maximum extent feasible, further releases of CCR contaminants to surface waters as required by the CCR Rule. Thus, allowing AESI to do anything less violates both the CWA and the CCR Rule.

[28] Report on Corrective Measures Assessment (Oct. 2019) at pdf p. 24.

While AESI and IDEM disagree, HEC stated a viable claim and the OALP's dismissal was clear error.

64. In its wholesale adoption of AESI and IDEM's arguments, the OALP concludes that "HEC newly contends that Section 301(b)(l)(C) of the CWA requires IDEM to include CCR Rule requirements in AES' NPDES Permit" but "[n]one of the caselaw or permit examples HEC relies on have any basis in Section 301(b)(l)(C)." Exh. A at 8, ¶18. There are several problems with this.

65. First, neither HEC's Amended Petition nor its response brief asserts that CWA Section 301(b)(l)(C) "requires IDEM to include CCR Rule requirements in AES' NPDES Permit." HEC's Amended Petition cites to this provision of the CWA as allowing IDEM to include in a NPDES Permit "any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations . . . *or any other Federal law or regulation*." 33 U.S.C. § 1311(b)(1)(C); 327 IAC 5-2-10(a)(4)(c) (emphasis added).[29]

66. In turn, HEC's response brief cites to this CWA provision to address AESI and IDEM's argument that "IDEM can only determine whether a permit should be issued by applying the relevant statutes and regulations," and that there is a "clear distinction between the regulatory schemes governing point source discharges to surface waters permitted under the CWA and the disposal of CCR in surface impoundments under solid waste rules" [30]—an argument parroted by the OALP. Exh. A at 3

[29] Amended Petition at ¶56.
[30] HEC Combined Response to AESI and IDEM's Motions to Dismiss at 10-11.

67. While these are correct statements of law, they do not support the OALP's conclusion that the CCR Rule has no application or relevance here. The plain language of CWA Section 301(b)(1)(C) expressly allows a permitting agency to incorporate "any more stringent limitation, including those necessary to meet . . . any other Federal law or regulation." 33 U.S.C. § 1311(b)(1)(C); 40 CFR § 122.44(d)(5); 327 IAC 5-2 10(a)(4)(C) (giving IDEM authority to "[i]ncorporate, in accordance with Section 301(b)(1)(C) of the CWA, more stringent limitations, treatment standards, or schedules of compliance requirements established under federal or state law or regulations"). In turn, the CWA's implementing regulations allow state agencies to coordinate and even consolidate permitting under the CWA and RCRA. *See* 40 CFR § 123.3; 40 CFR § 124.4.

68. And on that front, the CCR Rule unambiguously mandates the owner/operator of a coal ash impoundment subject to the Rule's corrective measures requirements to "immediately take all necessary measures to control the source(s) of releases so as to reduce or eliminate, to the maximum extent feasible, further releases of contaminants into the environment," which includes both ground and *surface waters*. 40 CFR § 257.90(d); 40 C.F.R. § 257.102 (c),(d). Issuing a NPDES Permit, as IDEM did, that allows AESI to pump coal ash contaminants out of the ground and then dump them directly into the White River when there is an existing waste treatment and disposal process AESI could use to prevent that outcome, violates the spirit if not plain language of this CCR Rule mandate.

69. Moreover, the CCR Rule flatly prohibits the "discharge of pollutants into waters of the United States that is in violation of the requirements of the National Pollutant Discharge Elimination System (NPDES) under section 402 of the Clean Water Act." 40 C.F.R. § 257.3-3(a). Such a violation is precisely what HEC is claiming the NPDES Permit allows here by failing to

require AESI to properly dispose of CCR contaminants removed from the treatment process already used at Eagle Valley.

70. Without question, IDEM can impose NPDES permitting conditions to ensure compliance with other laws including the CCR Rule. For that matter, IDEM did exactly that here by requiring AESI to monitor for coal ash contaminants listed in Appendices III and IV of the CCR Rule as a condition of Eagle Valley's NPDES Permit.[31] The OALP ignores this fact and instead states that "IDEM included [these] monitoring requirements to determine if any of the pollutants have reasonable potential to exceed established water quality criteria." Exh. A at 9, ¶19.

71. But that is not what IDEM said. As IDEM explained it, hexavalent chromium in particular "was selected for monitoring based on 329 IAC 10" and at "the discretion of OLQ."[32] In other words, IDEM's Office of Land Quality exercised its discretion to impose a NPDES permit condition on Eagle Valley, not based on any CWA requirement, but on state solid waste disposal regulations that incorporate the CCR Rule. *See* 327 IAC 10-9-1.

72. The OALP's conclusion that the CCR Rule can play no role in IDEM's NPDES permitting decisions has no foundation in the law. The fact that AESI is required to comply with both the CWA and the CCR Rule does not, as the OALP concluded, relieve IDEM of its NPDES "permitting obligation" to comply with CCR Rule mandates that apply to Eagle Valley's NPDES permitted activities. Exh. A at 4, ¶7. Both laws work in tandem to require AESI to employ the best available technology, processes, and measures that will eliminate or reduce to the maximum extent feasible, the further releases of coal ash contaminants into the White River. Because HEC pled facts demonstrating that IDEM issued a NPDES Permit allowing AESI to side-step this

[31] NPDES Permit at pdf p. 98.
[32] NPDES Permit at pdf p. 98.

requirement, HEC stated a colorable claim for relief under both the CWA and CCR Rule. The OALP's conclusion otherwise is contrary to law and should be reversed by the Court.

73. Also contrary to law is the OALP's conclusion that HEC somehow "waived" the additional arguments it raised in support of this claim in response to IDEM and AESI's motions to dismiss the claim simply because the arguments were not advanced in HEC's Amended Petition. Exh. A at 6.

74. AOPA does not require a petitioner to fully develop his claims and legal arguments at the pleading stage. Indeed, the Indiana Court of Appeals in *Ind. Office of Envtl. Adjudication, Dep't of Envtl. Mgmt. v. Kunz,* long ago confirmed that "administrative pleadings are to be liberally construed" and "need not enumerate precisely every event to which a hearing examiner may finally attach significance." 714 N.E.2d 1190, 1195-96 (Ind. Ct. App. 1999). "Rather, the purpose of the administrative complaint is to give the responding party notice of the charges against him" and "[r]eversal shall not occur absent evidence that a party is misled by an administrative complaint, resulting in prejudicial error." *Id.*

75. Here, HEC did way more than put IDEM and AESI on notice on the nature of its claims against the NPDES Permit. HEC's Amended Petition meticulously sets forth detailed factual and legal allegations that span 25 pages. And HEC's Combined Response to IDEM and AESI's Motions to Dismiss further develops two of those claims with additional legal authorities that IDEM and AESI had an opportunity to reply to—no one was misled or prejudiced.

76. For that matter, "a complaint is sufficient if it states any set of allegations, no matter how unartfully pleaded, upon which the trial court could . . . grant relief." *McQueen,* 711 N.E.2d at 65. There is no legitimate reasons to hold HEC to a higher standard.

77. The Court should set aside the OALP's unlawful dismissal of HEC's claim that the NPDES Permit violates the CCR Rule and the CWA.

*The OALP Erred in Dismissing HEC's Claim that the NPDES Permit Violates Antidegradation Requirements*

78. The OALP also unlawfully dismissed HEC's claim that the NPDES Permit for Eagle Valley violates antidegradation standards by allowing a new mercury discharge without requiring AESI to first comply with the antidegradation procedures set forth in 327 IAC 2-1.3-5 and -6.[33]

79. Adopting AESI and IDEM's arguments, the OALP erroneously concluded that this claim is untimely because HEC did not administratively challenge IDEM's issuance of a NPDES permit modification back in 2015 for AESI's planned conversion of Eagle Valley from a coal-burning to natural gas plant back in 2015. Exh. A at 5-6.

80. In that permitting decision, IDEM did not require antidegradation review based on AESI's 2015 "estimates" and "projections" that overall pollutant loadings of mercury would be reduced once the natural gas plant was operational.[34] Thus, AESI and IDEM argued—and the OALP agreed—that 2015 determination now bars any review of whether IDEM properly concluded in this case that the new mercury limit did not trigger antidegradation review.[35] This is wrong.

81. As discussed above, a TR 12(B)(6) motion to dismiss tests the legal sufficiency of the complaint, not the legal sufficiency of an affirmative defense. *Bellwether Properties, LLC,* 87 N.E.3d at 464, 466-467. As such, the complaining party "need not anticipate a statute of limitations

[33] Amended Petition at 17.
[34] AESI Motion to Dismiss at 8; IDEM Motion to Dismiss at 13.
[35] AESI Motion to Dismiss at 9; IDEM Motion to Dismiss at 13.

defense and plead matter[s] in avoidance in the complaint." *Id.* at 466 (quoting *Nichols v. Amax Coal Co.,* 490 N.E.2d 754, 755 (Ind. 1986)). However, where a "complaint shows on its face that the statute of limitations has run," then the complaining party may plead itself out of court. *Id.* That is not the situation here. Indeed, other than AOPA's 18-day window for seeking administrative review, which HEC unquestionably met, there is no statute of limitations or other time bar that applies to IDEM's decision on the applicability of antidegradation that HEC is challenging in this case.

82. Specifically, HEC seeks review of IDEM's determination that "the new effluent limitations for mercury . . . are not subject to the Antidegradation Implementation Procedures because they are not the result of a deliberate activity taken by the permittee."[36] That new agency decision, and the rationale for it, is subject to the OALP's administrative review under Indiana law regardless of what IDEM may have done or decided in the past. *See* Ind. Code § 4-21.5-7-3 (allowing administrative review agency actions); Ind. Code § 13-15-6-1 (allowing a "person aggrieved" by an agency action of IDEM to seek administrative review "not later than fifteen (15) days after being served" with notice of IDEM's action); Ind. Code § 13-15 6-2 (setting forth written requirements for a petition for administrative review of IDEM decisions, including review of "permit terms and conditions that, in the judgment of the person making the request" do not satisfy applicable legal requirements); Ind. Code § 13-15-6-3 (providing the environmental law judge with authority to "stay the force and effect" of a "contested permit provision").

83. While IDEM's 2015 determination may be relevant to the agency's present-day decision, that relevance does not serve to outright preclude review of IDEM's current decision. As HEC alleged (and IDEM's fact sheet confirms), the new mercury limit is based on actual effluent

[36] Amended Petition at ¶60.

data since 2015 showing that AESI's "estimates" and "projections" about its mercury loadings were wrong:

> As part of the permit modification issued December 17, 2015 . . . [t]he facility also provided *estimates* of effluent quality from the CCGT plant for regulated pollutants, including mercury, considering well water as a source and cycling in the cooling tower. Permit limitations for mercury were not included in the 2015 permit as a result of these projections. [However,] *Actual effluent data* from the CCGT plant for regulated pollutants were provided as part of this permit renewal and showed the need to establish water quality-based effluent limitations for mercury.[37]

84. In other words, the new mercury limit was imposed precisely because *actual* effluent data showed that the change in operations at Eagle Valley had, *in fact*, increased the plant's mercury discharges. Thus, IDEM's determination that those increased discharges were somehow not due to the "deliberate" change in operation at Eagle Valley, is the agency action that HEC is challenging now.[38] And that agency action is reviewable on its own terms regardless of IDEM's past decisions.

85. Moreover, nothing in Indiana's antidegradation provisions support OALP's conclusion that IDEM's 2015 decision precludes review of IDEM's subsequent decisions dealing with the applicability of antidegradation requirements to Eagle Valley's new gas plant. Pursuant to 327 IAC 2-1.3-1(b), "antidegradation implementation procedures . . . apply to a proposed new or increased loading of a regulated pollutant to surface waters of the state from a deliberate activity subject to the Clean Water Act, including a change in process or operation that will result in a significant lowering of water quality." This provision cannot be read to preclude antidegradation review of a new or increased loading caused by a change in operation, simply because the new or increased loading was not discovered until after the change in operation occurred. To hold

[37] Amended Petition at ¶62 (quoting NPDES Permit at pdf p. 102 (emphasis added)).
[38] Amended Petition at ¶¶60-63.

otherwise, as the OALP did, would allow utilities to submit inaccurate projections and estimates about their planned pollution discharges—as happened here—to avoid application of antidegradation review. That is not what the law intended.

86. Indeed, Indiana Code § 13-15-7-1 unequivocally gives IDEM the authority to revisit, revoke or modify a permit based on "[c]hanges in circumstances relating to the permit." Not only that, but IDEM specifically acknowledged in issuing the NPDES Permit to Eagle Valley that, "when renewing a permit, the existing permit limits, the anti-backsliding requirements under 327 IAC 5-2-10(a)(11), and the antidegradation requirements under 327 IAC 2-1.3 must be considered" anew.[39]

87. For the OALP to conclude that IDEM's new decision on antidegradation is not reviewable is patently contrary to law. In any event, HEC pled a colorable claim for relief that Eagle Valley's NPDES Permit violates antidegradation standards. And the OALP was wrong to dismiss it.

B. The OALP Erred in Granting Summary Judgment that HEC Lacks Associational Standing

88. In four conclusory paragraphs of its Final Order, the OALP makes the sweeping conclusion that "HEC did not prove it has associational standing" because its members who live in Martinsville "have suffered no injuries." OALP Final Order, Exh. C at 6-7. On its face, this conclusion is contrary to law.

89. As detailed further below, the very purpose of environmental permits like the NPDES Permit is to protect human health and the environment so that people do not suffer injury or illness. *See e.g.,* Ind. Code § 13-12-3-1(3) (stating a key purpose of Indiana's environmental

[39] NPDES Permit at pdf p. 96 (emphasis added).

laws is "to preserve, protect, and enhance the quality of the environment so that, to the extent possible, future generations will be ensured clean air, clean water, and a healthful environment").

90. More importantly, the OALP's conclusion flies in the face of long-standing Indiana precedent on who may seek administrative review of IDEM's permitting decisions, which does not require evidence of personal injury, illness, or harm. *See Huffman v. Ind. Office of Envtl. Adjudication,* 811 N.E.2d 806, 815-816 (Ind. 2004) (concluding that the petitioner had standing to seek administrative review of IDEM's renewal of a water pollution permit because of the *potential health risks* of exposure to the pollutants that would be discharged under the permit). In fact, the Indiana Supreme Court in *Huffman* expressly rejected the notion. *Id.* at 812 (concluding "the Legislature [c]ould have used phrases like 'personal stake' or 'direct injury'" when it drafted AOPA's aggrieved or adversely affected requirement but did not.)

91. Rather, to demonstrate associational standing, HEC must demonstrate three things: "(a) its members would otherwise have standing to sue in their own right; (b) the interests [HEC] seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Save the Valley v. Ind.-Kentucky Elec. Corp.,* 820 N.E.2d 677, 679-80 (Ind. Ct. App. 2005) (quoting *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333, 344, 97 S. Ct. 2434, 2442 (1977)).

92. The OALP made no findings or conclusions as to elements (b) and (c). But in any event, there is no question that HEC's pursuit of the underlying administrative appeal to stop Eagle Valley's uncontrolled pollution discharges of carcinogens and heavy metals to the White River furthers HEC's environmental mission. And since the relief requested is revocation or modification of a NPDES Permit, not monetary damages for HEC's members, their participation in this administrative proceeding is not necessary. *Save the Valley,* 820 N.E.2d at 682 (concluding that

since the environmental groups "only sought review of the granting of a permit and not an award of monetary damages, which would have required individualized proof," participation of the groups' members was not necessary).

93. As detailed below, the undisputed evidence also demonstrates that HEC meets the first prong of the *Hunt* test; that is, that HEC's members have standing in their own right to administratively challenge Eagle Valley's NPDES Permit because they are "aggrieved or adversely affected" by the Permit as required by AOPA. *See* Ind. Code § 4-21.5-3-7(a)(1)(B); 315 IAC 1-3-2(a)(3)(B). The OALP's conclusion that HEC lacks standing because its members are not sick and injured has no foundation in the law and relies on willful disregard of the material evidence.

*The OALP Ignored Undisputed Material Evidence*

94. In support of its conclusion that HEC lacks associational standing, the OALP refers to the affidavits and discovery answers of HEC members Anna Radue, Roger Radue, and David McSwane (Exh. C at 3, 6), while completely ignoring the affidavits of HEC experts, Dr. Indra Frank and Mark A. Hutson, P.G., and HEC's discovery answers that were designated by Respondent AESI.[40]

95. Collectively, these documents provide nearly 100 pages of detailed and undisputed testimony and evidence that supports HEC's associational standing. Yet the OALP devotes a single paragraph to mischaracterizing it. Specifically, the OALP concludes:

> The affiants' [HEC members'] averments state that they fear the alleged groundwater contamination will make their water supply unsafe, adversely affect their health through contaminants deposited on agricultural fields and/or make it unsafe to view surrounding wildlife or harm the health of wildlife. Despite their claiming they were aggrieved or adversely affected in their Affidavits, all three affiants acknowledged in their Responses to AES' Interrogatories that their

[40] AESI's Designation of Evidence at pdf pp. 1-2 (listing the affidavits of HEC's members and experts as HEC Original Petition Exhibits A-E and discovery answers of HEC and its members as Exhibits 11-14).

> activities around the White River have not changed as a result of the Permit, and they have suffered no injuries. Moreover, no evidence of harm to their or the wildlife's health was submitted.

Exh. C at 7. But HEC's members had much more to say than that.

96. As their affidavits confirm, Anna and Roger Radue have lived in the City of Martinsville since 1978, within two miles of the Eagle Valley plant and the White River. Anna Radue has a degree in microbiology and advanced degrees in environmental science and public affairs. She spent her professional career in various scientific positions at Eli Lilly & Company focused on antibiotic development, and later at the Midwest Center for Global and Environmental Change, where she worked on projects related to maintaining biodiversity. Roger Radue worked as a chemist at Eli Lilly & Company for thirty-five years. He also served for twenty years as the 38th Division Chemical Officer with the Indiana National Guard where he trained guard members in chemical, nuclear, and biological warfare.[41]

97. Due to their combined educational backgrounds and professional experience in chemistry, microbiology, and environmental science, the Radues understand the health threats they face from the ongoing coal ash contamination of the White River that is allowed by the NPDES Permit issued to Eagle Valley. Specifically, the Radues understand that coal ash contains dangerous carcinogens such as hexavalent chromium and arsenic, and toxic heavy metals that do not biodegrade and are dangerous to both animals and humans in even small amounts but are not limited by the Permit issued to Eagle Valley. As such, the Radues are concerned about the safety of their residential water supply, which comes from the City's municipal wells that are within the White River floodplain downstream of Eagle Valley.[42]

[41] HEC Original Petition, Exhibits A and B.
[42] HEC Orig. Pet, Exhs. A and B.

98. In addition, the Radues frequently enjoy hiking, bird watching and viewing wildlife, and taking their grandchildren to the natural areas and parks surrounding their homes—activities they have curtailed to avoid being exposed to coal ash contaminants that are continuously released into the White River from Eagle Valley.[43] In addition to their concern about the safety of their residential water supply, the Radues are concerned about the adverse effects on their health and to wildlife in the area from exposure to coal ash contaminants from Eagle Valley being deposited on agricultural fields within the White River floodplain near their home.[44]

99. In their answers to AESI's interrogatories, the Radues expanded on these concerns. And contrary to the OALP's finding that the Radue's "activities around the White River have not changed as a result of the Permit" (Exh. C at 7), Anna Radue confirmed otherwise:

> I am concerned that the coal ash pollution to the White River from Eagle Valley contains dissolved toxins such as arsenic, selenium, lead, mercury, and chromium that is entering the surface and groundwaters of my environment and endangering my health. These heavy metals bioaccumulate and damage our ecosystem. The farm fields between the White River and Blue Bluff Road are in the White River flood plain where coal ash contaminated river-bottom sediments can be deposited on the fields during flood events, which are becoming more frequent due to climate change. These toxins can then enter the air during dust storms as we had last spring or any windy day. I frequently walk 3.3 miles in my neighborhood about 5 times/week and am concerned I breathe these pollutants.
>
> . . . .
>
> The impact heavy metals have on public health is well documented. I recently discussed this situation with my physician, Andy Stafford, and he was shocked that IDEM permitted the release of coal ash effluents into the White River.
>
> . . . .
>
> At this time, I am not aware that I have any health issues from exposure to Eagle Valley's coal ash contamination of the White River, such as rare cancers, but these may take many years to develop.
>
> . . . .

[43] AESI Designation of Evidence at pdf pp. 157-159, 165-168 (Exh. 13 at pp. 4-6, Exh. 14 at pp. 4-7); HEC Orig. Pet, Exh. A at 3; Exh. B at 3.
[44] AESI Designation of Evidence at pdf pp. 157-159, 165-168 (Exh. 13 at pp. 4-6, Exh. 14 at pp. 4-7); HEC Orig. Pet., Exh. A at 4; Exh. B at 4.

I do not have a detailed log of my visits to Burkhart Creek County Park in the past five years. My husband and I visit the park on average once per month. We enjoy bird watching such as the cerulean blue warbler, looking at the creek, hiking the trails, checking on the salamanders in early spring and enjoying the topography. We are leaders of the Indiana University Club's hiking group and led a hike on May 26, 2021, with six other club members. ***I do not enter or swim in the creek although others visiting do. I do not let my grandchildren enter the creek waters out of concern that they could be exposed to coal ash contaminants in the water from Eagle Valley***. And, although I am not in direct contact with the water, this does not mean the toxins from Eagle Valley's discharges are not damaging the ecosystem of Burkhart Park.[45]

100. In turn, Roger Radue answered AESI's questions this way:

My wife and I often enjoy hiking, bird watching, and viewing wildlife in the surrounding area including Burkhart Creek County Park, a natural area that is downstream of Eagle Valley. When our grandchildren are in town, we like to take them to the Park, where they have enjoyed wading and playing in Burkhart Creek. I am concerned that the heavy metal toxins, which do not biodegrade, will continue to leach into the ground water and river resulting in a greatly increased probability of negative health effects for me, my wife, and local wildlife that we enjoy viewing. The idea of knowingly using water from a toxin containing coal ash pit for cooling purposes and then releasing that water into the river is unconscionable.

. . . .

My greatest concern is that dissolved heavy metal toxins bioaccumulate and that ppb (part per billion) levels of Mercury, Lead, Chromium, Arsenic and other known contaminants in coal ash can result in devastating health effects and that these toxins are allowed by the Permit to be discharged by Eagle Valley to the White River.

. . . .

My wife and I visit Burkhart Creek County Park and/or Ravinia Woods State Forest on average monthly. We enjoy hiking, bird watching and observing nature during the various seasons. We have taken our grandchildren with us on numerous occasions. ***While we always visit the creek and small ground water pools, we now do not intentionally enter the water due to our concerns regarding its contamination***.

. . . .

As far as I am aware, I have not yet experienced any health issues directly attributable to the release of heavy metals resulting from this permit. If and/or when I do it will be the result of truly irresponsible permitting. My knowledge of the

[45] AESI Designation of Evidence at pdf pp. 157-159 (Exh. 13 at pp. 4-6).

> toxins in the White River has created a deep sense of concern for the health and wellbeing of myself, my family, and my community, especially knowing that such toxins will not remain isolated to the White River itself but will likely be present in the surrounding ground and surface waters, the air, and the wildlife. ***And it has changed the way we interact with our environment as we no longer will visit Burkhart Creek or bring our grandchildren there***.[46]

101. Like the Radues, HEC member David McSwane is a long-time resident of Martinsville and has extensive education and professional experience in environmental science and public health including decades of teaching on the subject at Indiana University's School of Public and Environmental Affairs.[47] As he explained in his affidavit, David McSwane is aware that coal ash contains dangerous carcinogens like hexavalent chromium and arsenic, as well as heavy metals that do not biodegrade. And like the Radues, he is concerned that these contaminants will end up in his residential drinking water, which is sourced from the City of Martinsville's municipal wells, which are located within the White River floodplain.[48] He is particularly concerned that he and his wife will be exposed to hexavalent chromium in their drinking water because the City water utility does not test or treat for hexavalent chromium—a fact that is confirmed by the City's 2021 Water Report relied on by AESI to declare that the City's "drinking water is safe."[49]

102. The concerns of the Radues and David McSwane are credible and reasonable as confirmed by two highly qualified experts in the fields of hydrogeology, and in environmental health and toxicology, who are both familiar with conditions at Eagle Valley. First, Mark Hutson, an Indiana licensed professional geologist with 43 years of professional experience in hydrogeology, contaminated property investigation, and remediation, confirmed that people who

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[46] AESI Designation of Evidence at pdf pp. 165-168 (Exh. 14 at pp. 4-7).
[47] HEC Orig. Pet, Exh. C. *See also University Honors and Awards: David Zachary McSwane*, Indiana University, https://honorsandawards.iu.edu/awards/honoree/2522.html (last visited Oct. 25, 2024).
[48] HEC Orig. Pet, Exh. C.; AESI Designation of Evidence at pdf p. 150 (Exh. 12 at p. 4).
[49] HEC Orig. Pet., Exh. C; AESI Designation of Evidence at pdf pp 170-171 (Exh. 15 at pp. 1-2); AESI Summary Judgment Brief at 5.

rely on the City of Martinsville's water supply systems for drinking water and residential use have good reason to be concerned about the safety of their water from Eagle Valley's coal ash contaminated wastewater discharges.[50] Based on Mr. Hutson's review of relevant records and available information, he concluded that Eagle Valley's continued wastewater discharges will likely cause elevated concentrations of coal ash contaminants in the White River downstream of the plant, especially during periods of low river flow. As a result, these coal ash contaminants could be drawn into the City of Martinsville's significant water withdraw wells located in the White River floodplain, downstream of Eagle Valley, and into the City's water supply system.[51]

103. As Mr. Hutson explained, water and dissolved contaminants flow between a river channel and its adjacent floodplain sediments in response to changes in surface water and groundwater elevations. Consequently, water supply wells constructed in the floodplain, like the City of Martinsville's wells, are very likely to induce flow from the River toward the pumping wells thereby contaminating the City's water supply system. Mr. Hutson also concluded that people who live and recreate along the White River downstream of the Eagle Valley plant have good reason to be concerned about exposure to coal ash contaminated soils due to the continuous wastewater discharges from Eagle Valley. According to Mr. Hutson, the coal ash contaminants in the wastewater are likely to accumulate in river-bottom sediments at far higher concentrations than are detected in water samples. And those contaminated sediments can then be mobilized during high flow events and deposited in slack water areas along the surface of the floodplain downstream of the plant.[52]

[50] HEC Orig. Pet., Exh. D at 1-3.
[51] HEC Orig. Pet., Exh. D at 2-3.
[52] HEC Orig. Pet., Exh. D at 2-3.

104. Second, Dr. Indra Frank, who is an M.D. and has a Masters of Public Health, with more than two decades of professional experience in environmental health and toxicology, concluded that the potential routes of human exposure, identified by Mr. Hutson, to the coal ash contaminants from Eagle Valley pose serious health threats for people who are exposed to those contaminants. Specifically, based on her review of relevant records and available information, Dr. Frank concluded that Eagle Valley's continuous wastewater discharges to the White River contain coal ash contaminants including arsenic, boron, lithium, molybdenum, mercury, and likely hexavalent chromium. These contaminants are metals that do not biodegrade and are all toxic to humans.[53]

105. Dr. Frank confirmed that exposure to just 100 milligrams of arsenic is lethal to adult humans while repeated exposure to lower doses can damage the skin, nervous system, liver, heart, blood vessels, and the production of blood cells. Arsenic is also a known human carcinogen that causes skin, lung, and bladder cancers and may increase the risk of kidney, liver, and prostate cancer.[54] Hexavalent chromium is likewise a potent carcinogen known to cause oral and intestinal cancers by damaging DNA, meaning it poses a serious cancer risk at even exceedingly low concentrations. In turn, mercury is highly toxic to the human nervous system and can impair fetal brain development at very small doses. Mercury released to water bioaccumulates and concentrates in fish. Dr. Frank concluded that because none of these coal ash contaminants are limited by the NPDES Permit, except for mercury, people who rely on the water supply wells of the City of Martinsville for residential use, or who come in contact with contaminated river sediments

[53] HEC Orig. Pet. Exh. E at 2-5.
[54] HEC Orig. Pet. Exh. E at 3.

deposited in the White River flood plain downstream, have good reason to be concerned about their health from possible exposure to these contaminants.[55]

106. Contrary to the well-established standard of review under Trial Rule 56(C), none of this uncontroverted testimony and evidence found its way into OALP's limited version of the facts set forth in its Final Order. And contrary to the applicable law of AOPA standing, which the OALP also disregarded, this undisputed evidence confirms that HEC's members are aggrieved and adversely affected by the NPDES Permit and have standing in their own right to challenge it.

*HEC's Members Have Standing in Their Own Right*

107. What it means to be "aggrieved or adversely affected" under AOPA has been thoroughly considered and explained by Indiana courts and administrative tribunals including the former Office of Environmental Adjudication ("OEA")—and does not require evidence of personal injury as the OALP erroneously concluded.

108. The Indiana Supreme Court in *Huffman v. Ind. Office of Envtl. Adjudication,* clarified that being "aggrieved" is "more than a feeling of concern or disagreement with a policy; rather, it is a personalized harm" which occurs when "personal, pecuniary, or property rights are adversely affected." 811 N.E.2d 806, 810-12 (Ind. 2004). Thus, to be "aggrieved," a person must have "a substantial grievance, a denial of some personal or property right, the imposition of a burden or obligation," or a "legal interest which will be enlarged or diminished" as a result. *Id.* Put another way, a person is aggrieved or adversely affected when he has "suffered or [is] likely to suffer in the immediate future harm to *a legal interest*, be it a pecuniary, property, or personal interest." *Id.* at 810 (emphasis added).

[55] HEC Orig. Pet., Exh. E at 4-5.

109. To illustrate, the petitioner in *Huffman* was held to have standing to challenge IDEM's renewal of a water pollution permit because she was "aggrieved and adversely affected" by *potential* health risks of exposure to pollutants that would be discharged under the permit given her employment managing property near the discharge. *Id.* at 815-816.

110. Similarly, in *Save the Valley,* the Indiana Court of Appeals found that individual members of an environmental organization had standing (and, therefore, gave the organization standing) to seek administrative review of an IDEM-issued landfill permit because the members resided, worked and recreated in the area near the landfill and could be adversely affected by the landfill's impact on groundwater and emissions of fugitive dust. 820 N.E.2d at 682.

111. Here, HEC provided undisputed evidence demonstrating that its members Roger and Anna Radue and David McSwane are aggrieved or adversely affected by Eagle Valley's NPDES Permit. Like the petitioner in *Huffman* who was concerned about *potential* health risks from exposure to the IDEM authorized pollution discharges to a waterway near her place of employment, the Radues and David McSwane are concerned—and substantiated those concerns with credible expert evidence—about the health risks they face from Eagle Valley's uncontrolled discharges of heavy metals and carcinogens to a section of the White River that is the source of their drinking water that is not treated by the City's water utility for many of these contaminants.

112. And just as petitioners in *Save the Valley* had standing because they resided and recreated in the area near an IDEM approved landfill, the Radues have likewise established that they live near Eagle Valley, and often recreate and enjoy the nature areas within the floodplain of the White River downstream of Eagle Valley and are reasonably concerned about exposure to contaminated river bottom sediments.

113. Ignoring all of this, the OALP parrots AESI's argument that these concerns are the same for every citizen of Martinsville. Exh. C at 7. Stated differently, it is the OALP's view that since everyone in town could be made sick by Eagle Valley's discharges, then no one in town has standing to do anything about it. Not only is such an outcome absurd (and unjust), but it is not the way the law works.

114. The OALP cites to *Save the Valley* for the proposition that the "Indiana's Supreme Court has held that a party has standing under AOPA when s/he is 'not claiming a general injury sustained by the community as a whole.'" Exh. C at 7 (ostensibly quoting *Save the Valley,* 820 N.E.2d 677, 681). Aside from the fact that *Save the Valley* is a decision of the Indiana Court of Appeals, not Supreme Court, that is not what the decision stands for.

115. Rather, the appeals court in *Save the Valley* rejected a similar argument made by AESI in this case that the Radues and David McSwane lack standing because their "alleged interest in this proceeding is common to everyone who lives in Martinsville."[56] In support, AESI cited *Robertson v. Bd. of Zoning Appeals, Town of Chesterton,* 699 N.E.2d 310, 318 (Ind. Ct. App. 1998), which the court in *Save the Valley* squarely held had no application to understanding AOPA's standing requirements for two reasons. 820 N.E.2d at 681.

116. First, the court in *Save the Valley* rejected *Robertson* because it involved a zoning dispute and "the statutory scheme addressing zoning appeals is different than that provided for in AOPA." *Id.* Second, the court distinguished the facts of *Robertson* noting the environmental organization in that case "asserted it had standing as a public ombudsman to protect the interest of the community," which was not the situation in *Save the Valley. Id.* at 681.

[56] AESI Summary Judgment Brief at 7.

117. Rather, the environmental groups in *Save the Valley* (like HEC here) were "not claiming a general injury sustained by the community as a whole" but "that certain members of their groups [were] aggrieved or adversely affected by [IDEM's] granting of the [landfill] permit, and they [were] seeking to act in a representational capacity on behalf of those members." *Id.* To that end, the court held that the members had standing to challenge the landfill permit "in their own right" because they "reside[d], work[ed], and recreate[d] in the area affected by the landfill," and alleged that they "would be adversely affected by the [landfill's] impact on the groundwater and by fugitive dust." *Id.* at 682 (emphasis added). Notably, the court made no mention, contrary to OALP's conclusion, that the organizations' members lacked standing simply because there might be other people who likewise "lived, worked and recreated in the area affected by the landfill" but were not named in the proceeding.

118. If that were not enough to dispel OALP's unfounded conclusion, the former OEA, following *Huffman and Save the Valley*, consistently found petitioning parties who lived or recreated near polluting activities authorized by IDEM to have standing to challenge the agency's decisions based on precisely the same sort of health concerns about pollution exposure raised by the Radues and David McSwane in this case. *See e.g., Tanners Creek,* 2023 OEA 027, *034, 058 FN 9 (HEC member "stated sufficient facts in her affidavit to prove that she is aggrieved or adversely affected" by IDEM's approval of a coal ash closure plan because she "live[d] nearby and recreate[d] in and near the [site] via the nearby walking and biking trails, and water front areas" and was "concern[ed] about water contamination from the coal ash on the site"); *Objection to the Issuance of CFO Approval, Natural Prairie Indiana Farmland Holdings, LLC,* OEA Cause No. 19-WJ-5045, Findings of Fact, Conclusions of Law and Order at 3, 8 (Jan. 28, 2020) (concluding that petitioners had standing to challenge IDEM's issuance of a confined feeding

operation ("CFO") approval because they lived 2-3 miles from the planned CFO and were concerned about the safety of their drinking water that came from the aquifer where the CFO would be built); *Objection to the Issuance of NSR/PSF/Part 70 Operating Permit to Auburn Nuggett, LLC,* 2005 OEA 47, *53 (finding the petitioner had standing to challenge an air permit even though he lived sixteen (16) miles from the permitted facility because he "assert[ed] that he [drove] by the area approximately two times per month" and "spen[t] a good deal of time performing outdoor activities in [the] County").

119. Nothing in these OEA decisions support OALP's legal conclusion that a petitioner lacks standing to challenge an IDEM decision simply because there might be other people not named in the administrative proceeding who are similarly impacted by the decision.

120. All of this well-established and controlling Indiana precedent was presented to the OALP both in HEC's Amended Petition and in HEC's Consolidated Brief submitted both in Opposition to AESI and IDEM's Motions for Summary Judgment and in Support of HEC's Cross-Motion for Summary Judgment on Associational Standing. The OALP flatly ignored it.

121. Perhaps the OALP overlooked the overwhelming evidence and mandatory legal authorities on the issue of associational standing because it also ignored the express language of Indiana Trial Rule 56(A) and wrongly denied HEC's Cross-Motion for Summary Judgment on the Issue of Associational Standing; and in the process, also struck HEC's Consolidated Brief filed both in support of HEC's Cross-Motion and in opposition to AESI's summary judgment motion that raised the issue in the first place. Order Denying Cross-Motion, Exh B.[57]

[57] HEC incorporates herein by reference its Response to AESI's Objection to HEC's Cross-Motion for Summary Judgment on Associational Standing. For all the reasons stated therein, the OALP's ruling was an abuse of discretion, contrary to law and highly prejudicial to HEC. The OALP's decision ignores overwhelming case law confirming that litigants routinely cross-move for

122. But whatever the reason, the OALP's decision on the issue of associational standing is patently unlawful. Under the applicable AOPA standard, HEC demonstrated with undisputed, credible evidence that the Radues and David McSwane are aggrieved or adversely affected by the NPDES Permit that IDEM issued to Eagle Valley and thus have standing in their own right to seek administrative review of the Permit. Accordingly, the OALP erred in denying summary judgment for HEC on this issue.

C. The OALP Erred in Granting Summary Judgment for AESI and IDEM on HEC's Claim that the NPDES Permit Lacks Appropriate Mercury Limits and Monitoring Requirements to Assure the Water Quality Criterion for Mercury is Met

123. The OALP erred in granting summary judgement for Respondents on HEC's claim that the NPDES Permit lacks appropriate mercury limits and monitoring requirements to assure the Water Quality Criterion for Mercury is met. In its Order, the Court adopts the Respondents' misleading characterization of HEC's claim, distorting it into an argument that any permit limit for mercury that is above the water quality criterion ("WQC") is always improper.[58] Exh. C at 9 ("HEC argues that because the chronic water quality criterion for mercury is 12 ng/l, "a WQBEL in a NPDES permit limit must likewise be 12 ng/l.").

summary judgment on issues raised by an opponent's summary judgment motion. The OALP also imposed the extraordinarily harsh sanction of striking HEC's entire consolidated response brief submitted both in support of HEC's cross-motion for summary judgment on standing and in opposition to AESI's motion for summary judgment for exceeding the 30-page limit for briefs. This was a clear abuse of discretion considering the technical error was inadvertent and HEC could have submitted two, 30-page briefs and should be set aside by the Court. While courts are given broad discretion to enforce procedural rules like page limits, that discretion must be exercised reasonably in light of the circumstances and the "general preference to decide cases on their merits in spite of technical errors." *Mayberry v. Am. Acceptance Co., LLC*, 242 N.E.3d 1053, 1056 (Ind. 2024) (directing that a court should refrain from imposing severe penalties for rule violations unless a violation is egregious, in bad faith, or prejudices the opposing party.)

[58] AESI SJ Resp. at 5-6; IDEM SJ Resp. at 6.

124. The OALP goes on to conclude that "this argument is not supported by 327 IAC or by how maximum daily limits are calculated. Neither 327 IAC 2 nor 327 IAC 5 require or indicate that the maximum daily limit be set the same as the water quality criteria." Exh. C at 9. But that is not the argument that HEC made.

125. Rather, HEC has consistently argued that the Permit's maximum daily limit ("MDL") of 20 ng/l combined with the monitoring requirement of one grab sample every other month is improper because it will not assure compliance with the Permit's average monthly mercury limit ("AML") of 12 ng/l and the WQC.[59] Thus, HEC is not claiming that the DML for a BCC must always equal the WQC, but rather, that the DML should be the same as the AML for mercury in this case (which is the same as the WQC), because of the sampling frequency IDEM imposed.[60]

126. Yet in support of its holding, the OALP found that "HEC did not consider the differences between water quality standards, maximum daily effluent limits, average monthly effluent limits and the processes used by IDEM to generate the Permit's limitations." Exh. C at 8. This narrative, advanced by AESI and IDEM at every turn, is a red herring intended to distract from the deficiencies of the Permit that are brought to light by HEC's claim. Indeed, Petitioner's argument turns on a key tenet of this permitting regime that the OALP Final Order fails to consider: "[t]he decision on the monitoring frequency is case-specific and needs to consider a number of factors."[61]

127. In spite of the OALP and Respondents' relentless mischaracterizations, what HEC has consistently said is that setting an MDL of 20 ng/l combined with a monitoring frequency of

[59] *See* HEC Br. at 8-10; HEC Resp. at 28; HEC Reply at 5-6.
[60] *See* HEC Br. at 8-18; HEC Resp. Br. at 28; HEC Reply at 7.
[61] EPA TSD at p. 113.

one grab sample every other month, will not assure compliance with either the Permit's average monthly limit of 12 ng/l or the water quality criterion ("WQC") of 12 ng/l—a criterion that 327 IAC 5-2-11.1(b)(6) mandates "shall be applied directly to the undiluted discharge" since mercury is a bioaccumulative chemical of concern ("BCC"). In other words, the DML should be the same as the AML for mercury in this case (which is the same as the WQC) because of the sampling frequency IDEM imposed.[62]

128. To meet the relevant, chronic WQC for mercury, all agree that Eagle Valley's Permit must include both a daily max and a monthly average limit, as affirmed by the OALP. Exh. C at 9 (stating "pursuant to 327 IAC 5-2-11(d), IDEM is required to include both maximum daily and average monthly effluent limitations in an NPDES permit").[63] The OALP's Final Order restates IDEM's proffered calculations for "determining both the maximum daily and average monthly limits for specific parameters," summarily concluding "[t]he calculations relied upon are in accordance with 327 IAC 5-2-11 and EPA's TSD; thus, HEC did not meet its burden of proving IDEM's calculations for the Permit's mercury limits do not comply with 327 IAC 5-2-11 or the TSD." Exh. C at 9-11.

129. However, the OALP's restatement of these calculations and its related conclusions once again miss the point of HEC's actual claim; that is, setting an MDL of 20 ng/l combined with a monitoring frequency of one grab sample every other month, will not assure compliance with either the Permit's average monthly limit of 12 ng/l or the water quality criterion ("WQC") of 12 ng/l—a criterion that 327 IAC 5-2-11.1(b)(6) mandates "shall be applied directly to the undiluted discharge" since mercury is a bioaccumulative chemical of concern ("BCC").

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[62] *See* HEC Br. at 8-18; HEC Resp. Br. at 28; HEC Reply Br. at 7. HEC's Ans to AESI's Interrogatories 2 and 3.
[63] *See* AESI Resp. at 7.

130. In its discussion of these calculations, the OALP fails to take into account the fundamental purpose of the dual requirements, which is "to minimize wide swings in the daily values of pollutant concentrations that could nevertheless average out over a month to meet the WQC."[64] This purpose is critical to understanding why the AML and DML should be the same in this case as a result of the inadequate monitoring frequency IDEM imposed. Indeed, the regulations effectuate this purpose by providing special considerations that must be kept in mind when calculating the AML and MDL. Considerations that the OALP failed to address in its Final Ruling.

131. Specifically, Sections 5.2 and 5.3 of EPA's TSD explain that "the recommended permit limit derivation procedures [are intended to] account for extreme values and to establish low probabilities of exceeding of the WLA *in conformance with the duration and frequency requirements of the water quality standards*.[65] To that end, Section 5.5 of EPA's TSD goes on to discuss special considerations that a permit writer must keep in mind in calculating the AML and MDL including the "effect of changes in the number of monthly samples" on the permit limits derived:

> As the value for 'n' (number of observations) increases in the average monthly permit limit derivation equations, the average monthly permit limit decreases to a certain point. The effect on the average monthly limit is minimal for values of n greater than approximately 10. *Conversely, as the value for 'n' decreases, the AML increases until n=l, at which point* ***the AML equals the MDL*** (see Figure S-7).[66]

132. In other words, when the calculation is based on a single monthly sample as it is here,[67] instead of EPA's recommended four samples, the AML and MDL should be the same because the average of one daily sample is the value of the sample itself. *See also American*

[64] EPA TSD at pp. 93-97
[65] EPA TSD at pp. 96-97 (emphasis added)).
[66] EPA TSD at p. 105.
[67] *See* IDEM Resp. at 9-16.

*Petroleum Institute v. EPA,* 661 F.2d 340, 365 (5th Cir. 1981) (reviewing EPA's guidance and confirming that "if sampling is required only on a monthly basis, the monthly average limitation would be the same as the daily maximum").

133. Further, the TSD provides specific guidance on how the number of monthly samples should factor into the calculation of effluent limits for a BCC like mercury:

> For water quality-based permitting, effluent quality is determined by the underlying distribution of daily values, which is determined by the LTA [long term average] associated with a particular WLA [waste load allocation] and by the CV [coefficient of variation] of the effluent concentrations. Increasing or decreasing monitoring frequency does not affect this underlying distribution or treatment performance, which should, at a minimum, be targeted to comply with the values dictated by the WLA. **Therefore, it is recommended that the actual planned frequency of monitoring normally be used to determine the value of n [the number of samples per month] for calculating the AML [average monthly limit]. However, in situations where monitoring frequency is once per month or less, a higher value for n must be assumed for AML derivation purposes.** This is particularly applicable for addressing situations such as where *a single criterion is applied at the end of the pipe* and a single monthly sample is contemplated for compliance monitoring purposes, or where monitoring frequency is only quarterly. **In this case, both the average monthly and the MDL [maximum daily limit] would exceed the criterion . . . A discharger could thus comply with the permit limit but routinely exceed the criterion.** *Under these circumstances, the statistical procedure should be employed using an assumed number of samples of at least four for the AML derivation*.[68]

134. IDEM's own "technical, detailed spreadsheet" of calculations, on which the OALP relied to dispose of HEC's claim, thus confirms that IDEM calculated the effluent limits for mercury based on a singly monthly sample, contrary to the applicable guidance.

135. Yet, despite HEC's detailed briefing of on this point, the OALP summarily held that "HEC provides no legal support for its conclusion" that "IDEM's requiring AES to monitor for mercury six times annually is impermissible," concluding that HEC had failed to "explain how the Permit's frequency does not comply with 327 IAC 5-2-13." Exh. C at 12. This is simply not true.

[68] EPA's TSD at pp. 107-110.

136. As demonstrated by the citations to the Record above, HEC made a clear showing of the legal underpinnings of its claim that the Permit's monitoring frequency fails to comply with the requirements of 327 IAC 5-2-13.

137. Rather than engage with these arguments, the OALP's Final Order echoes Respondents' insistence that 327 IAC 5-2-13(c)(2) "does not establish specific monitoring frequencies for NPDES permits but instead gives IDEM's Commissioner discretion to determine them." Exh. C at 11. HEC does not contest this point, but rather, the OALP's apparent interpretation that this discretion is unfettered.

138. While a permitting agency's discretion to establish monitoring frequencies is certainly broad, it is nevertheless limited to "carrying out the objective of the CWA." *United States Steel Corp. v. Train*, 556 F.2d 822, 850 (7th Cir. 1977). And that objective is to "assure compliance" with all permit limits, terms, and conditions. 40 CFR § 122.44(i); 327 IAC 5-2-13(a). IDEM did not do that here.

139. In fact, the OALP cites to a list of factors from EPA's TSD that should have been considered by IDEM in selecting an appropriate monitoring frequency.[69] Exh. C at 12. Yet, the OALP declines to acknowledge that nowhere in the NPDES Permit, the supporting technical documents, or IDEM's fact sheet does it indicate that IDEM considered any of those factors here.

140. For that matter, the TSD also recommends that "ideally 10 or more samples per month" should be imposed to "provide the greatest statistical likelihood that the average of the various monthly values will approach the true monthly LTA value[;]" or at minimum, a monitoring frequency that reflects "a reasonable compromise" based on the list of factors.[70] Without question,

[69] EPA's TSD at p. 113.
[70] EPA's TSD at p. 113 (emphasis added).

none of that was done by IDEM in this case and the OALP's failure to consider these deficiencies was in clear error.

141. Indeed, the CWA and IDEM rules mandate that required monitoring must be of the "type, intervals, and frequency sufficient to yield data which are representative of the monitored activity including, when appropriate, continuous monitoring." 40 CFR §122.48(b); *see also* 327 IAC 5-2-13(c)(2). On its face, a monitoring frequency that "yields" *no data* for 359 days of the year about levels of a dangerous BCC like mercury in wastewater that is discharged continuously to a river every day, year-round, does not come close to meeting this test.

142. Section 5.5.3 of the EPA TSD makes clear that when calculating effluent limits for a BCC like mercury where the WQC is applied at the point of discharge, at least four monthly samples should be assumed in the calculation to avoid the very situation here where the one required monthly sample may comply with permit limits but exceed the WQC.

143. Yet, the OALP conspicuously sidesteps this important authority, providing the same justification for IDEM's flawed calculation, namely that "Mercury has an acute aquatic criterion of 2,400 ng/1 --- a value much higher than the maximum daily mercury limit in the Permit."[71] Exh. C at 8. AESI similarly argued that "if any WQC were to be applied as the *daily* effluent limitation, it would be the *acute* WQC (2,400 ng/l for mercury), not the chronic WQC."[72]

144. But, as HEC explained at length in its briefing, the acute aquatic criterion is irrelevant in this case because, as IDEM itself confirmed, the limits in a NPDES permit "are based on the *more stringent* of Indiana water quality-based effluent limitations."[73] For mercury, the more

[71] HEC Reply Brief, p. 8.
[72] AESI Resp. at 6 (emphasis in original).
[73] IDEM Resp. at 2 (emphasis added).

stringent WQC is the chronic criterion based on a four-day average concentration of 12 ng/l. Thus, it is the chronic criterion, not the acute aquatic criterion, which is relevant here.[74]

145. In another wholesale adoption of Respondents' arguments, the OALP goes on to hold that because "HEC offers no alternative frequency it believes IDEM was required by law to include in the Permit," it has failed to comply with Ind. Code § 13-15-6-2(6). Exh. C at 12. In coming to this conclusion, the Final Order does not engage with HEC's three proffered arguments for why this interpretation of the statute is mistaken and HEC is not in fact required to identify an alternative monitoring frequency.

146. First, Indiana Code § 13-15-6-2(6) applies to the contents of a petition for administrative review of an IDEM decision. Specifically, the statute requires, among other things, for the petition to "[i]dentify the permit terms and conditions that, in the judgment of the person making the request, would be appropriate . . ." Ind. Code § 13-15-6-2(6). Nothing in the plain language of this pleading requirement has anything to do with summary judgment. Nor does it require a petitioner to state every single appropriate permit term and condition at a level of such precision and specificity that a failure to do so would defeat the petitioner's otherwise valid legal claims.

147. Indeed, the Indiana Court of Appeals in *Ind. Office of Envtl. Adjudication, Dep't of Envtl. Mgmt. v. Kunz,* long ago rejected a similar argument, explaining:

> It is, of course, well settled that administrative pleadings are to be liberally construed and amended. A complaint in an administrative proceeding need not *enumerate precisely every event to which a hearing examiner may finally attach significance.* Rather, the purpose of the administrative complaint is to give the responding party notice of the charges against him. Reversal shall not occur absent evidence that a party is misled by an administrative complaint, resulting in prejudicial error.

[74] HEC Reply Brief, p. 8.

714 N.E.2d 1190, 1195-96 (Ind. Ct. App. 1999) (internal citations omitted).

148. Second, if AESI and IDEM believed that HEC's petition for administrative review was deficient, the time and place to raise the argument was in a Trial Rule 12(B)(6) motion to dismiss for failure to state a claim, but they did not. *Kunz* at 1194 (confirming that Indiana Code § 13-15-6-2 pleading requirements are not a matter of subject matter jurisdiction, such that a petitioner should be afforded an opportunity to amend, if its administrative petition does not meet the requirements).

149. Third, HEC's Amended Petition does identify a proper monitoring frequency for mercury; namely, one "that assure[s] compliance with the permit limits" as required by 40 CFR 122.44(i). And on that front, the undisputed evidence confirms that EPA's TSD—the guidance that IDEM says it follows as "standard practice"—directed IDEM to assume at least four monthly samples in calculating permit limits for a BCC, and "ideally" to impose a monitoring frequency of at least 10 monthly samples; or at minimum, to impose a frequency that reflects "a reasonable compromise" based on a list of factors.[75]

150. Far from requiring the "ideal 10 or more samples per month" or anything close to a "reasonable compromise," the NPDES Permit for Eagle Valley requires a single monthly sample to be taken every *other* month, while giving the company a complete pass on sampling for mercury in the other six months of the year. As a result, IDEM indisputably has not complied with the mandated minimum monitoring frequency, and therefore the OALP should have granted summary judgement for HEC on this issue.

151. Further, OALP's holding that HEC did not present specific facts demonstrating a genuine issue for trial sufficient to withstand Respondents' motion for summary judgement failed

[75] EPA's TSD at p. 113 (emphasis added).

to engage with any of HEC's arguments that were supported by extensive legal authorities and evidence. *See* Exh. C at 12. The OALP's disposition of this issue in favor of Respondents was therefore in clear error and should be reversed by this Court.

D. The OALP Erred in Granting Summary Judgment for AESI and IDEM on HEC's Claim that IDEM Failed to Assess Whether Concentrations of Carcinogens in Eagle Valley's Discharges Have a Reasonable Potential to Exceed Water Quality Criteria to Protect Human Health from Cancer in Violation of the CWA.

152. As the OALP confirms, Indiana has "a narrative criterion 'to protect human health from unacceptable cancer risk of greater than one (1) additional occurrence of cancer per one hundred thousand (100,000) population.'" OALP Final Order, Exh. C at 13 (citing that 327 IAC 2-1-6(a)(2)(A)(iv)).

153. It was IDEM's position during discovery below that it was not required to evaluate whether the known carcinogens the agency identified in Eagle Valley's discharges have a reasonable potential to exceed this criterion, simply because it is narrative and not numeric.[76] The OALP agreed with that view.

154. But as federal CWA regulation plainly states, the absence of numeric criteria is not a valid reason for the agency to avoid conducting the reasonable potential analysis. Instead, the regulation mandates that NPDES permit "limitations must control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the [permitting authority] determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above *any* State water quality standard, including State *narrative* criteria for water quality." 40 CFR § 122.44(d)(1)(i) (emphasis added).

[76] NPDES Permit at pp. 126-127; IDEM Answers to Requests to Admit 1-7; IDEM Answers to Interrogatories 5, 6 and 7.

155. Nowhere does it say that a permitting agency gets a pass on conducting the reasonable potential analysis for water quality criteria that are not in numeric form. Indeed, U.S. EPA guidance on the topic confirms this:

> The regulation also specifies that the reasonable potential determination *must apply not only to numeric criteria, but also to narrative criteria* (e.g., no toxics in toxic amounts, presence of pollutants or pollutant parameters in amounts that would result in nuisance algal blooms). A permit writer can conduct a reasonable potential analysis using effluent and receiving water data and modeling techniques, as described above, or using a non-quantitative approach.

U.S. EPA, *NPDES Permit Writers' Manual, Ch. 6: Water Quality-Based Effluent Limitations,* 6-13 (emphasis added).

156. Recognizing this, IDEM shifted its position to argue that has "discretion" not to conduct a reasonable potential analysis.[77] In support of its new argument, IDEM cited to the *draft* of 40 CFR § 122.44(d) for the proposition that "[t]here is flexibility in the state's interpretation of its narrative water quality criteria," and "water quality-based effluent limits are required only for pollutants present in an effluent *at concentrations of concern* to the permitting authority."[78]

157. Remarkably, the fact that IDEM itself identified *known* human carcinogens in Eagle Valley's discharges was somehow not enough reason for it to be concerned and did not "suggest that [Eagle Valley] is discharging these pollutants in amounts that have the potential to cause an excursion of the narrative human health cancer criterion."[79] But that is not the way the law works as confirmed by the draft EPA rule that IDEM selectively quotes.

158. As an initial matter, IDEM did identify the carcinogens in Eagle Valley's discharges as "pollutants of concern" and in fact evaluated their reasonable potential to exceed Indiana's water

[77] IDEM Summary Judgment Resp Br. at 11.
[78] IDEM Summary Judgment Resp. Br. at 11 (quoting 54 Fed. Reg. 23868 (Jun. 2, 1989).
[79] IDEM Summary Judgment Resp. at 11-12.

quality criteria that are in numeric form.[80] The agency simply chose not to conduct the reasonable potential analysis for Indiana's human health cancer criterion because it is narrative.

159. But contrary to IDEM's view (adopted by the OALP, Exh. C at 12-13) that the distinction between numeric and narrative criteria allows it to ignore the narrative criteria when conducting the reasonable to exceed analysis,[81] the draft of 40 CFR § 122.44(d) plainly states otherwise—that "narrative standards have the *same force and effect* as other state water quality standards." 54 Fed. Reg. 23868 (emphasis added). The draft rule says nothing about an agency having discretion to disregard narrative water quality criteria simply because conducting the reasonable potential analysis involves a difficult calculation.

160. Instead, the draft rule confirms that agencies have discretion in *how* they go about conducting the reasonable potential analysis but have no discretion not to conduct the analysis at all:

> Subparagraph (ii) of § 122.44(d)(1) *concerns the procedures* for determining whether a discharge must have a water quality-based effluent limit . . . To determine whether a discharge causes, has a reasonable potential to cause, or contributes to an excursion above a water quality criterion, and thus requires a water quality-based effluent limit, the permitting authority *must use reliable and consistent procedures. Although the procedures can vary considerably* from one state to another, most such procedures account for any dilution of the effluent in the receiving water, after considering mixing zones if applicable, any contributions of the pollutant from upstream point and nonpoint sources, the variability of the pollutant in the effluent, and, when evaluating whole effluent toxicity, the sensitivity of the test species in a toxicity test.
>
> Paragraph (iii) does not require limits for every pollutant but only for those pollutants which the permitting authority determines must be limited *after applying the procedures described in paragraph (ii)*.

*Id.* (emphasis added).

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[80] NPDES Permit at pdf p. 126 (setting preliminary effluent limits for the identified carcinogens--arsenic, beryllium, cadmium, and lead—based on *numeric* water quality criteria).
[81] IDEM Summary Judgment Resp. at 10.

170. Notably, all of this is echoed in Section 5.1.1 of EPA's TSD that IDEM claimed to have followed in this case:

> The regulations at 40 CFR 122.44(d)(1) *require* that regulatory authorities first determine whether a discharge causes, has the reasonable potential to cause, or contributes to an excursion above water quality standards (*narrative* or numeric). In making these determinations, regulatory authorities *must use a procedure* that accounts for effluent variability, existing controls on point and nonpoint sources of pollution, available dilution, and (when using toxicity testing) species sensitivity. Each of these regulations were previously discussed in Chapter 3.[82]

180. In turn, Chapter 3, Section 3.3.8 of the TSD states:

> If a State does not have a numeric water quality criterion for the pollutant of concern, then *one of three options* for using the narrative criterion may be used (40 CFR 122.44(d)(l)(vi)) to determine whether a discharge causes, has the reasonable potential to cause, or contributes to an excursion above a narrative criteria because of an individual pollutant. Although the provisions of 40 CFR 122.44(d)(l)(vi) are presented in the regulation in the context of permit limit development, these same considerations should be applied in characterizing effluents in order to determine whether limits are necessary.[83]

190. And none of this critical EPA guidance or legal authorities made their way into the OALP's three-paragraph, entirely conclusory and one-sided decision on this issue. Exh. C at 12-13.

191. Instead, the OALP parrots IDEM and AESI's arguments that 327 IAC 2-1-6(a)(2)(C) somehow gives IDEM discretion not to evaluate whether the carcinogens in Eagle Valley's discharges have the reasonable potential to exceed Indiana's human health cancer criterion. Exh. C at 12.[84] But the problem with this is that the provision simply carries out the directive in 40 CFR 122.44(d)(l)(vi) that governs agency discretion in choosing *how,* not *whether,* to conduct the reasonable potential analysis.

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[82] EPA Technical Support Document at 93.
[83] EPA TSD at 62.
[84] AESI Summary Judgment Resp. at 15-16.

192. Specifically, 327 IAC 2-1-6(a)(2)(A)(iv) states that "[a] toxic substance or pollutant *must not be* present in surface waters outside of mixing zones in concentrations that exceed the most stringent of the of the following continuous criterion concentrations (CCCs)," including "[f]or carcinogenic substances, a criterion to protect human health from unacceptable cancer risk of greater than one (1) additional occurrence of cancer per one hundred thousand (100,000) population."

193. In turn, 327 IAC 2-1-6(a)(2)(C) states that IDEM "may" use one the procedures "prescribed in sections 8.3 through 8.6" to calculate a CCC for a substance that lacks a numeric criterion. Giving IDEM procedural options for calculating a CCC is not the same as giving IDEM discretion not to do the calculation at all as the OALP concluded.

194. Nevertheless, the OALP adopts another AESI argument that HEC has not "shown that deriving numeric human health cancer criteria would have resulted in more stringent effluent limits in AES' Permit" or would have had any health benefits. Exh. C at 13.[85] There are several problems with this. As an initial matter, HEC designated the affidavit testimony of a medical doctor and public health expert, Dr. Indra Frank, who confirmed the serious public health threats associated with Eagle Valley's uncontrolled discharges of carcinogens to the White River. Plainly, eliminating a cancer threat is a benefit to human health.

195. Furthermore, EPA's TSD that IDEM supposedly follows provides ample evidence of the human health benefits of, and the critical need to control discharges of carcinogens into waterways. And on that front, EPA's TSD directs permit writers to use EPA procedures when "developing reference ambient concentrations (RACs) for those pollutants lacking EPA human

[85] AESI Summary Judgment Resp. at 17.

health criteria," and "RACs may be applied *as site-specific* interpretations of narrative standards and *as a basis for permit limits* under 40 CFR 122.44 (d)(l)(vi)."[86]

196. Not only that, but the TSD provides a detailed explanation and formula for calculating site-specific RACs for carcinogens, and directs permit writers to:

> [Use] the most current risk information when . . . generating RACs. The Integrated Risk Information System (IRIS) is an electronic online data base of the U.S. EPA that provides chemical-specific risk information on the relationship between chemical exposure and estimated human health effects. Risk assessment information contained in the IRIS, except as specifically noted, has been reviewed and agreed upon by an interdisciplinary group of scientists representing various program offices within the Agency and represent an Agencywide consensus. Risk assessment information and values are updated monthly and are approved for Agencywide use.
>
> . . .
>
> EPA periodically updates risk assessment information including RfDs, cancer potency estimates, and related information on contaminant effects, and reports the current information on IRIS. Since the IRIS contains the Agency's most recent quantitative risk assessment values, current IRIS values should be used in developing new RACs. This means that the 1980 human health criteria should be updated with the latest IRIS values. The procedure for deriving an updated human health water quality criterion would require inserting the current RfD or carcinogenic potency estimate on the IRIS into the appropriate equation in Section 2.4.7 or 2.4.8. Figure 2-3 shows the procedure for determining an updated criterion or RAC using IRIS data. If a chemical has both carcinogenic and noncarcinogenic effects, i.e., both a cancer potency estimate and WD, the carcinogen RAC formula in Section 2.4.8 should be used as it will result in the more stringent RAC of the two.[87]

197. There is no question that IDEM did not do any of this here, choosing instead to ignore Indiana's human health cancer criterion and let carcinogens flow freely into the White River simply because calculating RACs or CCCs would take time. And the OALP rubber-stamped that unconscionable decision without any meaningful consideration or analysis of the facts and law.

[86] EPA's TSD at p. 36 (emphasis added).
[87] EPA's TSD at p. 37-40.

198. Finally, we have no idea if the NPDES Permit would have more stringent limits had IDEM calculated RACs or CCCs for the carcinogens in Eagle Valley's discharges based on Indiana's narrative human health cancer criteria, precisely because IDEM failed to do the calculation. But contrary to the OALP's decision, the agency's failure to do its job does not require HEC to step in and do it. Nor does the possibility that the results of the calculation might not have made a difference in permit limits relieve IDEM of its statutory obligation to determine if it would have made a difference.

199. In sum, there is no dispute that IDEM failed to evaluate whether carcinogens in Eagle Valley discharges have a reasonable potential to exceed Indiana's narrative criterion for protecting human health from cancer despite the clear statutory and regulatory requirement to do so. The OALP should have granted summary judgment for HEC on this issue.

**Conclusion:**

The OALP's Final Ruling allows a dangerous shell game at Eagle Valley to continue. Under the guise of a NPDES Permit, AESI can keep pumping dangerous coal ash contaminants out of the ground (that it is supposed to "contain") and then dump them right back into the environment in violation of the plain language and intent of the CCR Rule and the CWA. The OALP's conclusion that IDEM has nothing wrong, and that HEC and its members lack standing to do anything about it has no foundation in the law or evidence. In reaching its Final Ruling, the OALP ignored fundamental procedural and evidentiary standards under Trial Rule 12 and 56, completely disregarded the law of standing, ignored the overwhelming evidence before it, and failed to engage in any meaningful way with HEC's arguments. Accordingly, the OALP's Final Ruling is a clear example of arbitrary and capricious decision-making, is an abuse of the agency's discretion, wholly

contrary to law, and unsupported by preponderance of evidence. This Court owes no discretion to the OALP's Final Ruling and should set it aside.

## VII. Request for Relief, Specifying the Type and Extent of Relief Requested (Ind. Code § 4-21.5-5-7(b)(7))

For all the foregoing reasons, and pursuant to Ind. Code § 4-21.5-5-15, HEC respectfully requests this Court to set aside the OALP's unlawful Final Ruling and remand the matter back to IDEM with instructions to approve a NPDES Permit that fully complies with applicable federal and state law.

Respectfully submitted,

/s/ *Kim E. Ferraro*

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## VERIFICATION

I affirm under penalties for perjury that the above and foregoing statements and representations are true to the best of my knowledge and belief.

*/s/ Kim E. Ferraro*

## CERTIFICATE OF SERVICE

I certify that on March 20, 2025, the foregoing document was filed with the Morgan County Court via the Court's electronic filing system and served upon the following parties by Certified Mail, Return Receipt Requested:

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I also certify that on March 20, 2025 the foregoing document was served via electronic mail upon the following attorneys of record in the underlying OALP proceeding.

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