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Introduction:

Indiana courts are no longer required to give deference to state agencies that abuse their administrative power. 2024 Ind. HEA 1003, Sec. 12 (amending Ind. Code § 4-21.5-5-11).² In this case, that is precisely what the Indiana Department of Environmental Management (“IDEM”), the former Office of Environmental Adjudication (“OEA”), and the Office of Administrative Law Proceedings (“OALP”)³ did. IDEM abused its authority by issuing a water pollution permit to Indianapolis Power & Light d/b/a AES-Indiana (“AESI”) for its Eagle Valley Generating Station (“Eagle Valley”) that allows the power plant to discharge untreated wastewater laden with neurotoxins, carcinogens, and poisons from coal ash into a stretch of the White River upstream of the City of Martinsville’s municipal wells. IDEM did so in violation of environmental laws intended to protect human health and the environment from precisely this sort of toxic risk.

In turn, the former OEA and the OALP, acting through the same administrative law judge (“ALJ”), issued three dispositive rulings that rubber-stamped IDEM’s unlawful permitting decision, leaving unabated a dangerous pollution threat to the White River and residents of Martinsville. In doing so, the ALJ ignored the law and evidence, disregarded procedural rules, and trampled on the rights of Hoosiers to obtain fair, impartial, and independent administrative review of state agency decisions that adversely affect their interests. For these reasons, detailed further below, this Court should set aside the ALJ’s unlawful rulings.

² 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/>.

³ The Hoosier Environmental Council filed the underlying administrative appeal with the former 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.

I. Statement of Material Facts and Relevant Procedural History

This matter stems from a permit that IDEM issued on, March 21, 2023, under the Clean Water Act’s National Pollutant Discharge Elimination System (“NPDES”) to AESI for its Eagle Valley power plant in Martinsville (the “NPDES Permit”). 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.⁴

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. U.S. 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); U.S. 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) (“CCR Rule”).

Even so, disposal of this toxic waste stream 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. Indiana has more coal ash ponds than any other state in the nation. U.S. EPA, *Regulatory Impact Analysis (RIA) for EPA’s 2015 Coal Combustion Residuals (CCR) Final Rule*, Docket ID No. EPA-

⁴ Rec. Pt. 3: OALP001032 ((AESI October 2022 Closure Plan for Ponds A, B, & C).

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.⁵

Indeed, the coal 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.⁶ These unlined waste ponds sit next to the West Fork of the White River, within the river’s floodplain, and are carved deep into the ground at depths just directly above, and in some areas within, the shallow sand and gravel groundwater system that adjoins the river.⁷

Due to decades of contaminants leaching from these coal ash waste ponds into the uppermost aquifer, and in some places coming into direct contact with the aquifer, contamination of 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.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

⁵ Sarah Bowman, *Other States are Making Utilities Dig Up Toxic Coal Ash. Indiana is Letting it Sit There*, Indianapolis Star (Feb. 10, 2021) at <https://www.indystar.com/story/news/environment/2021/02/10/other-states-more-protective-than-indiana-toxic-coal-ash/6657744002/>.

⁶ Rec. Pts. 3-4: OALP001045, OALP001065, OALP001188, OALP001363 (AESI October 2022 Closure Plan for Ponds A, B, & C).

⁷ Rec. Pt. 5: OALP001631-61, OALP001762 (Oct. 2022 Closure Plan).

⁸ Rec. Pt. 6: OALP002063 (HEC Amended Petition at 3, ¶5).

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).

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-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).

At the time IDEM issued the NPDES Permit, AESI’s closure plan for Eagle Valley’s coal ash ponds was (and still is) to leave the waste sitting in the White River floodplain forever.⁹ As for corrective measures, AESI’s plan was (and still is) to “hydraulically control” the migration of contaminated groundwater from reaching the River by continuously pumping it for use as cooling water in the powerplant’s operations. As AESI explained it, the high-capacity wells at Eagle Valley have reversed the flow of groundwater away from the river such that the wells are “capturing” and “containing” the coal ash contaminants so they do not reach the river.¹⁰ The problem with this plan is that it is not prevent the contaminants from reaching the river. After the coal ash polluted groundwater is “captured” by the wells, “containing” the contaminants depends on Eagle Valley’s

⁹ IDEM recently approved AESI’s Closure Plan on January 10, 2025.

¹⁰ See Rec. Pt. 6: OALP002064-002065 (HEC Amended Petition at 4-5); AESI’s Updated Corrective Measures Assessment (April 5, 2024) at pdf 8-9, 27 is available on the company’s CCR Rule compliance website at <https://www.aesindiana.com/sites/aesvault.com/files/2024-04/Eagle-Valley-CMA-Update-04-05-2024.pdf>. This plan likewise contemplates use of the production wells to hydraulically contain around 65% of contaminated groundwater from reaching the river.

NPDES Permit, which requires AESI to do no such thing. Instead, the NPDES Permit allows AESI to continuously release the captured contaminants *without limit*, directly to the river.

As IDEM confirmed, the captured groundwater “is the source water for all processes at [Eagle Valley] and is provided by the production wells” located near the unlined coal ash ponds.¹¹ And that groundwater contains “pollutants historically contributed by coal ash” including antimony, arsenic, barium, beryllium, boron, cadmium, calcium, cobalt, hexavalent 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 chemicals to the White River.¹²

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 discharges¹³ As IDEM admitted, when it evaluated whether concentrations of these carcinogens may have a reasonable potential to exceed water quality criteria, the agency did not consider the criteria that would provide an acceptable degree of protection to human health from cancer because the criteria are narrative, instead of numeric.¹⁴

Not only that, but IDEM placed no limits on Eagle Valley’s ongoing releases of coal ash contaminants even though the power plant has a reverse osmosis (“RO”) water treatment system in place that could be used to prevent this. Specifically, the RO system is used to remove coal ash

¹¹ Rec. Pt. 3: OALP000956-57, OALP000959-60 (NPDES Permit Factsheet).

¹² Rec. Pt. 3: OALP000956-57, OALP000959-60 (NPDES Permit Factsheet (requiring only “monitoring” for the coal ash pollutants)).

¹³ Rec. Pt. 3: OALP001003-04 (NPDES Permit Attachment 8); Rec. Pt. 5: OALP001843-44 (IDEM Ans. to HEC Req. to Admit Facts 1-7).

¹⁴ Rec. Pt. 3: OALP000870-71 (IDEM Ans. to Ints. 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.”)); Rec. Pt. 3: OALP001003-1004 (NPDES Permit Attachment 8).

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 the waste right back into the spent cooling water, which is then discharged *untreated* to the White River.¹⁵

This shell game of pumping and dumping is particularly concerning for people who live in the City of Martinsville, including three members of the Hoosier Environmental Council (“HEC”). The City’s municipal wells that supply residents’ drinking water are in the White River floodplain downstream of Eagle Valley. And while the City’s water utility treats the water for many pollutants, it does not test or treat for some of the coal ash contaminants that are in Eagle Valley’s wastewater discharges.¹⁶ According to the affidavits of two highly-qualified experts in the fields of hydrogeology, 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. *Infra* at 42-44.

IDEM did impose limits on Eagle Valley’s mercury discharges, finding they have a reasonable potential to exceed the numeric mercury chronic aquatic criterion (4-day average) of 12 ng/l (nanograms per liter).¹⁷ IDEM confirmed that since mercury is a bioaccumulative chemical of concern (“BCC”), this water quality criterion (“WQC”) must “be applied directly to [Eagle Valley’s] undiluted discharge for all discharges.”¹⁸ Even so, IDEM set a monthly average mercury

¹⁵ Rec. Pt. 3: OALP000949-50 (NPDES Permit Fact Sheet); Rec. Pt. 6: OALP002065 fn. 4, 6-8 (HEC Amended Petition at 5 (citing to pdf pages 12, 16-27 of AESI’s *Report on Corrective Measures Assessment* of October 2019 prepared by Haley Aldrich.))

¹⁶ Rec. Pt. 3: OALP000805 (AESI Exh. 15-City of Martinsville 2021 Water Quality Report).

¹⁷ Rec. Pt. 3: OALP000957, 000967, 000994, 001003-001004 (HEC MFSJ Exh. E-NPDES Permit Factsheet and Technical Documents); Rec. Pt. 5: OALP001851 (HEC MFSJ Exh. H-HEC Ans. to AESI’s Req. to Admit 2).

¹⁸ Rec. Pt. 3: OALP001003-001004 (HEC MFSJ Exh. E-NPDES Permit Attachment 8, fn. 8).

limit of 12 ng/l,¹⁹ defined as “the highest allowable average monthly discharge for any calendar month.”²⁰ IDEM also included a daily maximum limit of 20 ng/l,²¹ defined as “the maximum allowable daily discharge for any calendar day.”²² And as for monitoring, IDEM set a requirement for Eagle Valley to take a single grab sample every other month,²³ even though the facility discharges 1.3 million gallons per day to the White River, every day, year round.²⁴

IDEM admitted in discovery that with these limits and monitoring frequency, the value of the one grab sample taken in a particular month is both the daily value for that day, as well as the monthly average value for that month.²⁵ Accordingly, IDEM also admits that if the one sample meets the daily maximum limit of 20 ng/l, it violates the monthly average limit of 12 ng/l.²⁶ In turn, IDEM believes that the absence of sampling data in the other six months of the year when no sampling is required, is somehow proof of compliance. In support of that view, IDEM acknowledges that “[c]ompliance with effluent limits in a NPDES Permit is determined based on sampling,” but insists that no sampling means “there can be no noncompliance.”²⁷ According to the agency, this outcome is perfectly okay because Eagle Valley could “choose” to take some

¹⁹ Rec. Pt. 3: OALP000883, 000887, 000957, 000967 (HEC MFSJ Exh. E-NPDES Permit at 3, 7, 13, 23).

²⁰ Rec. Pt. 3: OALP000893-000894 (HEC MFSJ Exh. E-NPDES Permit at 13-14).

²¹ Rec. Pt. 3: OALP000883, 000887, 000957, 000967 (HEC MFSJ Exh. E-NPDES Permit at 3, 7, 13, 23).

²² Rec. Pt. 3: OALP000894 (HEC MFSJ Exh. E-NPDES Permit at 14).

²³ Rec. Pt. 3: OALP000883, 000887, 000957, 000967 (HEC MFSJ Exh. E-NPDES Permit at 3, 7, 13, 23). A “grab sample” is one “taken from a waste stream on a one-time basis without consideration of the flow rate of the waste stream and without considerations of time.” Rec. Pt. 3: OALP000895 (HEC MFSJ Exh. E-NPDES Permit at 15).

²⁴ Rec. Pt. 3: OALP000992 (HEC MFSJ Exh. E-NPDES Permit, Wasteload Allocation Analysis).

²⁵ Rec. Pt. 5: OALP001846 (HEC MFSJ Exh. G-IDEM Ans to HEC’s Req. to Admit 20 and 21).

²⁶ Rec. Pt. 3: OALP000873 (HEC MFSJ Exh. D-IDEM Ans to HEC Interrogatory 12).

²⁷ Rec. Pt. 3: OALP000873 (HEC MFSJ Exh. D-IDEM Ans. to HEC Interrogatory 13).

samples if it wanted to and this is “consistent with IDEM’s historic practice” in issuing “other industrial NPDES permits.”²⁸

Because this is not what the law requires, HEC sought administrative review of the NPDES Permit on behalf of its members who live in Martinsville, under the doctrine of associational standing—a doctrine long recognized in Indiana as applicable to administrative proceedings like this one. *See Save the Valley, Inc. v. Indiana-Kentucky Elec. Corp.*, 820 N.E.2d 677, 682 (Ind. Ct. App. 2005). HEC filed its original Petition on April 17, 2023, and amended it on July 5, 2023 (“Amended Petition”) seeking revocation of Eagle Valley’s NPDES Permit based on four claims:

- (1) for violating the CCR Rule and the Clean Water Act (“CWA”) by failing to impose a permit requirement for AESI to properly dispose of the internal waste stream laden with coal ash contaminants removed from the pumped groundwater by Eagle Valley’s RO treatment system (“CCR Claim”);
- (2) for failing to meet the CWA’s antidegradation requirements (“Antidegradation Claim”);
- (3) for violating the CWA by failing to impose appropriate effluent limits and monitoring requirements for mercury to ensure Indiana’s water quality criterion for mercury is met (“Mercury Claim”); and
- (4) for violating the CWA by failing to assess whether levels carcinogens in Eagle Valley’s wastewater discharges have a reasonable potential to exceed human health cancer criteria (“Cancer Criteria Claim”).²⁹

²⁸ Rec. Pt. 3: OALP000872-000873 (HEC MFSJ Exh. D-IDEM Ans. to HEC Interrogatories 11 and 13).

²⁹ Rec. Pt. 6: OALP002061-85 (HEC’s Amended Petition). Following discovery, HEC withdrew two other claims that were raised in the Amended Petition. *See* Rec. Pt. 3: OALP000809 (HEC’s Motion for Summary Judgment at 3, ¶4).

In support of these claims, HEC’s Amended Petition sets forth detailed pleading allegations with citation to record evidence and established legal authority. Nevertheless, early in the proceeding, the presiding ALJ (then with the OEA) granted AESI and IDEM’s motions to dismiss the CCR Claim and Antidegradation Claim for failure to state a claim (“OEA Dismissal Order”).³⁰ In doing so, the ALJ misstated and misconstrued these claims and outright ignored the vast majority of HEC’s pleading allegations, contrary to the applicable standard of review under Indiana Trial Rule 12(B)(6). *Infra* at 13-33.

In summary judgment briefing on the remaining Mercury Claim, the Cancer Criteria Claim, and the issue of HEC’s associational standing, HEC designated extensive, undisputed evidence and argument supported by citation to mandatory precedent and legal authority.³¹ Even so, the same ALJ, now with the OALP, issued two rulings, ultimately granting summary judgment in favor of AESI and IDEM, that ignored all of it.

In the first ruling, the ALJ denied HEC’s cross-motion for summary judgment on the issue of associational standing as “untimely” (“OALP Order Denying HEC’s Cross-Motion”), even though it was filed on the response deadline in opposition to AESI’s summary judgment motion that raised the issue.³² The ALJ also imposed the extraordinarily harsh sanction of striking HEC’s consolidated response brief submitted both in opposition to AESI’s summary judgment motion and

³⁰ Rec. Pt. 6: OALP001971-79 (OEA, *Findings of Fact, Conclusions of Law and Non-Final Order* (Oct. 30, 2023)).

³¹ Rec. Pt. 3: OALP000812-26 (HEC Memorandum in Support of Partial Summary Judgment (Aug 26, 2024)); Rec. Pt. 3: OALP000827-29 (HEC Designation of Evidence (Aug. 26, 2024)); Rec. Pt. 1: OALP000111-48 (HEC Consolidated Brief in Opposition to AESI’s Motion for Summary Judgment and in Support of HEC’s Cross-Motion for Summary Judgment on Associational Standing (Oct. 25, 2024)); Rec. Pt. 1: OALP000150-52 (HEC Supplemental Designation of Evidence (Oct. 25, 2024)); Rec. Pt. 1: OALP000026-48 (HEC Consolidated Reply in Support of Partial Summary Judgment (Nov. 14, 2024)).

³² Rec. Pt. 1: OALP000082 (OALP, *Order Denying Petitioner’s Untimely Filing of Its Cross Motion for Summary Judgment* at 2, ¶4 (Nov. 13, 2024)).

in support of HEC’s cross-motion on standing. The ALJ did so because the brief exceeded the 30-page limit by 5 pages.³³ Never mind that the exceedance was inadvertent and HEC could have filed two, 30-page briefs.³⁴ As detailed below, the ALJ’s ruling disregards the procedural requirements of TR 56(A) that allows cross-motions to be filed in response to an opponent’s motion for summary judgment. It also ignores the Indiana Supreme Court’s directive that courts should refrain from imposing such severe penalties for technical violations unless they are egregious, made in bad faith, or prejudice the opposing party, none of which apply here. *Mayberry v. Am. Acceptance Co., LLC*, 242 N.E.3d 1053, 1056 (Ind. 2024); *see also infra* at 49-53.

In the second ruling, the ALJ granted summary judgment for AESI and IDEM on HEC’s Mercury Claim, the Cancer Criteria Claim, and associational standing. The ruling also made final the OEA Order of Dismissal and the OALP Order Denying HEC’s Cross-Motion (collectively, the “OALP Final Order”).³⁵ As with the ALJ’s prior rulings, the OALP Final Order disregards the material evidence presented by HEC, contrary to the standard of review under TR 56, and applicable law. *Infra* at 34-68.

Collectively, the ALJ’s three dispositive rulings are so one-sided as to give the unmistakable impression that the ALJ did not act fairly, independently, or impartially in this case. For that matter, the ALJ adopted many of AESI and IDEM’s arguments nearly verbatim—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

³³ Rec. Pt. 1: OALP000082 (Order Denying HEC’s Cross-Motion at 2, ¶5).

³⁴ Rec. Pt. 1: OALP000083-89 (HEC Response to AESI’s Objection to HEC’s Cross-Motion for Summary Judgment on Associational Standing (Nov. 8, 2024)).

³⁵ Rec. Pt. 1: OALP000001-14 (OALP, *Findings of Fact, Conclusions of Law and Final Order* (Feb. 18, 2025)).

appellate court that the findings are the result of considered judgment.”) For these reasons, discussed further below, the Court should set aside each of the ALJ’s unlawful rulings.

II. Argument

A. Standard for Judicial Review of Agency Action

A court on judicial review shall set aside an 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 a preponderance of the evidence.” Ind. Code § 4-21.5-5-14.

Under this standard, the reviewing court owes no deference to the agency’s legal conclusions or factual findings. The Indiana legislature made this clear when it amended AOPA to end “*Chevron* deference” in Indiana³⁶ so that courts will provide a meaningful check on agencies’ abuse of administrative power. 2024 Ind. HEA 1003. Under the new law, a reviewing court “shall decide all questions of law . . . *without deference* to any previous interpretation made by the agency” and is “not bound” by the agency’s factual findings, which must be supported by a “preponderance of the evidence,” not merely “substantial evidence” as before.³⁷ 2024 Ind. HEA 1003, Sec. 12 and Sec. 14(d)(5) (amending Ind. Code § 4-21.5-5-11 and -14(d)(5)). The ALJ’s three rulings in this case fail to meet this test and should be reversed.

B. The OEA Dismissal Order is Arbitrary, Capricious, an Abuse of Discretion, Contrary to Law, and Not in Accordance with Trial Rule 12(B)(6)

³⁶ 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).

³⁷ “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).

The standard of review for a motion to dismiss under Indiana Trial Rule 12(B)(6) is well known. The reviewing 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.” *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)). Stated differently, “[t]he court may only look to the complaint, and well-pleaded material must be taken as admitted.” *McQueen v. Fayette County Sch. Corp.*, 711 N.E.2d 62, 65 (Ind. Ct. App. 1999). “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.” *Id.*

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 plaintiff “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). And notably, Rule 12(B)(6) motions are viewed “with disfavor because [they] undermine the policy of deciding causes of action on their merits.” *McQueen*, 711 N.E.2d at 65. Accordingly, dismissal is “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.

The ALJ failed to follow this established standard in dismissing HEC’s CCR Claim and Antidegradation Claim. The ALJ ignored most of HEC’s pleading allegations, misstated others, and overall misconstrued HEC’s Amended Petition *against* HEC. And in dismissing the antidegradation claim, the ALJ improperly considered what amounts to an affirmative defense that has no foundation in the law. Accordingly, the OEA Dismissal Order should be set aside.

1. *The ALJ ignored the allegations HEC pled in support of the CCR Claim*

The ALJ dismissed HEC's CCR Claim for "fail[ing] to state a claim that can be remedied through the appeal of AES' NPDES Permit."³⁸ In support, the ALJ reasoned that while "HEC contends AES' use of groundwater for its facility processes does not comply with the CCR Rule requirements," HEC "does not identify the NPDES permit terms and conditions" that would "satisfy the requirements of the law governing [NPDES] permits, . . . does not claim AES' NPDES Permit fails to satisfy the requirements of any applicable NPDES law," and does "not provide operative facts necessary to set forth an actionable claim."³⁹ This flatly ignores HEC's pleading allegations in several respects.

First, the factual grounds for HEC's CCR Claim are not based on AESI's mere use of CCR contaminated groundwater for Eagle Valley's processes. As alleged in paragraphs 12 and 57 of HEC's Amended Petition, the basis of the claim is IDEM's failure to impose a NPDES Permit requirement for AESI to properly dispose of the internal waste stream generated by the RO treatment system used at Eagle Valley to remove the coal ash contaminants from the pumped groundwater before it is used as process water in the plant:

12. While the CCR contaminated groundwater that is 'captured' by Eagle Valley's production wells is treated prior to use as cooling water, instead of properly disposing of the CCR contaminated effluent that is generated from that treatment process, the waste is put back into the cooling water after it is used in the plant, and then released, untreated, to the White River as allowed by the IDEM-issued NPDES Permit.

. . .

57. [IDEM must] . . . impos[e] 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.⁴⁰

³⁸ Rec. Pt. 6: OALP001975 (OEA Dismissal Order at 5).

³⁹ Rec. Pt. 6: OALP001974-001975, OALP001978 (OEA Dismissal Order at 4-5, 8).

⁴⁰ Rec. Pt. 6: OALP002066, OALP002077 (Amended Petition at ¶12, ¶157 (emphasis added)).

These are the “operative facts” that must be taken as true and construed in HEC’s favor. Yet, the ALJ outright ignored them and dismissed the CCR Claim based on facts HEC never pled. This error, which permeated the ALJ’s entire analysis, is reason enough alone to set the ruling aside.

Second, paragraph 57 of HEC’s Amended Petition unambiguously identifies the “NPDES permit term” that HEC contends IDEM should impose to comply with the CCR Rule:

57. [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.⁴¹

In turn, paragraph 56 sets forth “applicable NPDES law” that gives IDEM the authority to impose this permit concision:

56. [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).⁴²

While these allegations may not be fully developed or artfully pled, they state a colorable claim for relief that Eagle Valley’s NPDES Permit violates the CWA. The ALJ’s conclusion otherwise depends on ignoring these allegations contrary to the established standard of review required by TR 12(B)(6).

⁴¹ Rec. Pt. 6: OALP002077 (Amended Petition at ¶12, ¶57).

⁴² Rec. Pt. 6: OALP002076 (Amended Petition at ¶12, ¶56).

The ALJ similarly misconstrued HEC's pleading allegations in support of the CCR Claim as a "collateral attack on AES' compliance with the CCR Rule," concluding that "appealing AES' NPDES Permit is [not] the proper forum to challenge AES' compliance or non-compliance with the CCR Rule."⁴³ But HEC is not challenging AESI's compliance with the CCR Rule. HEC is challenging Eagle Valley's NPDES Permit for violating 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.⁴⁴ 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."⁴⁵ Nevertheless, the ALJ concluded that none of this is relevant because HEC could appeal AESI's closure plan,⁴⁶ which misses the point entirely.

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 plans for corrective measures and closure under the CCR Rule. Moreover, when imposing technology-based effluent limits on a case-by-case basis, as IDEM did here,⁴⁷ the agency must consider, among other factors: "[t]he appropriate technology

⁴³ Rec. Pt. 6: OALP001974-75 (OEA Dismissal Order at 4-5, ¶¶7-8).

⁴⁴ Rec. Pt. 6: OALP002069-70 (Amended Petition at ¶¶ 9-10).

⁴⁵ Rec. Pt. 6: OALP002075 (Amended Petition at ¶52 (citing 40 C.F.R. §§ 257.90(d); 257.102(d)).

⁴⁶ Rec. Pt. 6: OALP001975 (OEA Dismissal Order at 5, ¶9).

⁴⁷ Rec. Pt. 6: OALP002224-002226 (NPDES Permit Fact Sheet at 8-10.)

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.

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.⁴⁸ In other words, AESI’s corrective measures assessment provides evidence of a technology that eliminates, or substantially reduces, the discharge of toxic pollutants as required by the CWA. *Infra* at 22-31. 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, as IDEM did, violates both the CWA and the CCR Rule. While AESI and IDEM disagree, their disagreement was not enough to warrant the ALJ’s dismissal of HEC’s CCR Claim under TR 12(B)(6).

⁴⁸ See Rec. Pt. 6: OALP002065 (Amended Petition at 5 (citing to pdf pages 12, 16-27 of AESI’s *Report on Corrective Measures Assessment* of October 2019 prepared by Haley Aldrich.) This quote is found on pdf page 24 of the Correct Measures Assessment, which is publicly available on AESI’s CCR Rule compliance website at <https://www.aesindiana.com/sites/default/files/2021-02/IPL-EV-CMA-Final.pdf>.) In its response to AESI and IDEM’s motions to dismiss, HEC provided this same quote and citation to page 24 of the Corrective Measures Assessment. See Rec. Pt. 6: OALP001990 (HEC Resp. to Motions to Dismiss at 10, fn. 7). Pursuant to Indiana Rule of Evidence 201, HEC requests the Court to take judicial notice of AESI’s October 2019 Corrective Measures Assessment. Ind. R. Evid. 201(a)(1)(B) (allowing a court to “judicially notice a fact that can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.”)

For that matter, in blindly accepting AESI and IDEM’s arguments, the ALJ concluded that HEC somehow “newly contend[ed]” in its response to AESI and IDEM’s motions to dismiss “that Section 301(b)(1)(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)(1)(C).”⁴⁹ There are several problems with this.

First, neither HEC’s Amended Petition nor its response brief asserts that CWA Section 301(b)(1)(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).⁵⁰

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”⁵¹—an argument parroted by the ALJ.⁵²

While these are correct statements of law, they do not support the ALJ’s conclusion that the CCR Rule has no application or relevance here. The plain language of CWA Section

⁴⁹ Rec. Pt. 6: OALP001978 (OEA Dismissal Order at 8, ¶18).

⁵⁰ Rec. Pt. 6: OALP002076-77 (Amended Petition at ¶56).

⁵¹ Rec. Pt. 6: OALP001990-91 (HEC Resp. to AESI and IDEM’s Motions to Dismiss at 10-11).

⁵² Rec. Pt. 6: OALP001973 (OEA Dismissal Order at 3, ¶4).

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.

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.

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.

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.⁵³ The ALJ flatly ignored this and instead made a finding lacking any evidentiary support, that “IDEM included [these] monitoring requirements to determine if any of the pollutants have reasonable potential to exceed established water quality criteria.”⁵⁴ 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.”⁵⁵ In other words, IDEM’s Office of Land Quality (“OLQ”), not water quality (“OWQ”), exercised its discretion to impose a NPDES permit condition on Eagle Valley, not based on any CWA requirement, but on 329 IAC 10. That provision sets forth Indiana’s solid waste disposal regulations that incorporate the CCR Rule. *See* 327 IAC 10-9-1. That regulation has nothing to do with IDEM’s reasonable potential to exceed analysis under the CWA as the ALJ erroneously found.

Without question, the ALJ’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 ALJ concluded, relieve IDEM of its NPDES “permitting obligation” to comply with CCR Rule mandates that apply to Eagle Valley’s NPDES permitted activities.⁵⁶ 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,

⁵³ Rec. Pt. 3: OALP000976 (NPDES Permit-IDEM Resp. to Comments).

⁵⁴ Rec. Pt. 6: OALP001978 (OEA Dismissal Order at 8, ¶19).

⁵⁵ Rec. Pt. 3: OALP000976 (NPDES Permit-IDEM Resp. to Comments).

⁵⁶ Rec. Pt. 6: OALP001974 (OEA Dismissal Order at 4, ¶7).

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

2. *The ALJ disregarded the law applicable to the CCR Claim*

In addition to ignoring and misstating HEC's pleading allegations, the ALJ accepted IDEM and AESI's arguments whole-cloth without meaningfully engaging with HEC's arguments. And in doing so, the ALJ disregarded the law that applies to HEC's CCR Claim. For instance, the ALJ agreed with IDEM that because of the definition of "solid waste," IDEM has no authority under CCR Rule to place a NPDES permit condition requiring proper disposal of the RO generated waste stream.⁵⁷ Specifically, IDEM insisted that:

The definition of 'solid waste' under Indiana law, which forms the basis of IDEM's regulatory authority for its solid waste programs including its regulation of CCR surface impoundments, explicitly excludes solid or dissolved material in industrial discharges that are point sources subject to permits under Section 402 of the CWA. Ind. Code §13-11-2 205(a)(1)(B); see also 40 CFR § 257.2. By definition, wastewater discharged under the NPDES Permit is not a solid waste and is therefore outside the scope of the CCR Rule.⁵⁸

While this is true, IDEM failed to mention that this exclusion from the solid waste definition for NPDES-permitted industrial wastewater discharges "applies only to the actual point source discharge." 40 CFR § 261.4(a)(2). It "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.*" 40 CFR § 261.4(a)(2) (emphasis added). In other words, contrary to IDEM's argument, the internal waste stream generated by Eagle Valley's RO

⁵⁷ Rec. Pt. 6: OALP001977-78 (OEA Dismissal Order at 7-8, ¶17).

⁵⁸ Rec. Pt. 6: OALP002040 (IDEM Motion to Dismiss at 7).

treatment system is a “solid waste” subject to solid waste rules, including the CCR Rule, until the waste reaches the point of discharge to the river.

HEC brought this legal authority to the ALJ’s attention in responding to IDEM’s argument. Yet, the ALJ rejected it, concluding that 40 C.F.R. § 261.4(a)(2) applies only to the definition of “hazardous waste” but not “solid waste” like coal ash.⁵⁹ The ALJ’s reading depends on inventing language that does not exist. Indeed, the first sentence of this provision states that the listed exclusions are “[m]aterials which are not *solid wastes*.” 40 C.F.R. § 261.4(a) (emphasis added). No mention of hazardous waste there. In turn, the solid waste exclusion in (a)(2) for NPDES permitted industrial wastewater discharges makes clear that:

This exclusion applies only to the actual point source discharge. It 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.

40 C.F.R. § 261.4(a)(2). No mention of hazardous waste there either. Thus, the ALJ’s view that this exclusion from the definition of solid waste, applies only to hazardous waste is flatly wrong.

Also wrong is the ALJ’s disregard of 40 C.F.R. § 261.4(a)(2) as somehow part of a “new contention” that HEC purportedly raised in responding to IDEM and AESI’s motions to dismiss.⁶⁰ As an initial matter, courts are obligated to ascertain and apply the correct law regardless of whether the parties properly bring the law to the court’s attention. *Dedelow v. Pucalik*, 801 N.E.2d 178, 184 (Ind. Ct. App. 2003). Moreover, HEC cited 40 C.F.R. § 261.4(a)(2) to refute IDEM’s baseless assertion that the CCR Rule has no role to play in Eagle Valley’s NPDES Permit due to the definition of solid waste.⁶¹ Responding to an opponent’s argument with a counter argument

⁵⁹ Rec. Pt. 6: OALP001977-78 (OEA Dismissal Order at 7-8, ¶17).

⁶⁰ Rec. Pt. 6: OALP001977-78 (OEA Dismissal Order at 7-8, ¶17).

⁶¹ Rec. Pt. 6: OALP002040, OALP002043 (IDEM Motion to Dismiss at 7, 10); Rec. Part 6: OALP001985 (HEC Resp. to IDEM and AESI Motions to Dismiss at 5).

and supporting legal authority not enumerated in the initial pleading is not tantamount to raising a new claim.

Indeed, a petitioner in an administrative proceeding is not required to fully develop his claims and legal arguments at the pleading stage. The Indiana Court of Appeals in *Ind. Office of Env'tl. Adjudication, Dep't of Env'tl. 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). For that matter, prematurely dismissing a petitioner’s claim without providing “the parties an opportunity to provide additional evidence or to develop the arguments more fully, such as through a hearing” is contrary to TR 12(B)(6) and AOPA. *Huffman v. Ind. Office of Env'tl. Adjudication*, 811 N.E.2d 806, 814 (Ind. 2004) (also concluding that premature dismissal has the added consequence that an ALJ’s findings will not be supported by evidence).

This is consistent with Indiana’s notice-pleading standard that similarly requires a “short and plain statement of the claim showing that the pleader is entitled to relief.” Ind. Trial Rule 8(A), (F) (and directing courts to liberally construe pleadings so “as to do substantial justice, lead to disposition on the merits, and avoid litigation of procedural points.”) This liberal pleading standard is precisely why “a complaint is sufficient” under TR 12(B)(6) “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 reason to hold HEC to a higher standard.

Even so, the ALJ went on to parrot AESI’s insistence that HEC “improperly raise[d] two (2) new claims related to technology-based effluent limitations [“TBELs”] and IDEM’s application

of best professional judgment (BPJ).”⁶² But just as HEC’s citation to 40 C.F.R. § 261.4(a)(2) is not a new claim, HEC’s discussion of relevant legal authorities pertaining to TBELs and IDEM’s BPJ are not new claims either. HEC advanced these arguments to rebut IDEM’s insistence that it had no obligation under the CWA “to place internal permit limits on the [pumped] groundwater itself.”⁶³ Aside from the fact that placing permit limits on the pumped groundwater is not the issue—requiring proper disposal of the RO waste stream is—HEC demonstrated conclusively that IDEM can and must set technology based effluent limits on Eagle Valley’s discharges to effectuate that outcome.⁶⁴

Specifically, technology-based permit limits, which are a corner stone of NPDES permitting, are typically “applied prior to or at the point of discharge” and may include requirements for pollutants that are “removed in the course of treatment or control of wastewaters.” 40 C.F.R. § 125.3(e),(g). Such technology-based 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 those limits must “become more stringent over time” until the CWA’s goal of eliminating pollution discharges is achieved. *Id.*; *see also EPA v. Nat’l Crushed Stone Ass’n*, 449 U.S. 64, 69 (1980) (confirming the CWA’s goal of “eliminating the discharge of pollutants into the navigable waters” through “increasingly stringent effluent limitations” on individual point sources). Stated differently, technology-based limits are intended to be “technology-forcing” and “should force agencies and permit applicants to adopt technologies that achieve the greatest reductions in pollution.” *NRDC v. EPA*, 808 F.3d 563-64 (2nd Cir. 2015).

⁶² Rec. Pt. 6: OALP001976 (OEA Dismissal Order at 6, ¶12); *compare* Rec. Pt. 6: OALP002008 (AESI Reply in Support of Motion to Dismiss at 9).

⁶³ Rec. Pt. 6: OALP001986 (HEC Resp. to AESI and IDEM Motions to Dismiss at 6, quoting IDEM Motion to Dismiss at 10)

⁶⁴ Rec. Pt. 6: OALP001986-89 (HEC Resp. to AESI and IDEM Motions to Dismiss at 6-9).

As IDEM explained in the Factsheet for Eagle Valley’s NPDES Permit, “EPA has established technology-based effluent guidelines for steam electric generating facilities” like Eagle Valley based on “best practicable control technology (BPT)” and “best available control technology (BAT).”⁶⁵ *See also* 33 U.S.C. § 1311(b)(1)(A) and (b)(2)(A)); 40 C.F.R. § 401.12(b). “The less stringent of these two standards is BPT, which is considered only a first step toward [the Act’s] goal.” *Sw. Elec. Power Co. v. United States EPA*, 920 F.3d 999, 1006 (5th Cir. 2019) (quoting *Nat’l Crushed Stone*, 449 U.S. at 75 n.14). As such, “BPT limitations are intended to represent the average of the best levels of performance by existing plants of various sizes, ages, and unit processes within the category or subcategory for control of conventional pollutants.” *Id.*⁶⁶

On the other hand, toxic pollutants must be limited by application of BAT, which should “reflect the amount of pollutant that would be discharged by a point source employing the best available technology” determined by the agency “to be economically feasible across the category or subcategory as a whole.” *Id.* That means, BAT limits “must be based on the performance of the single best-performing plant in an industrial field” and “must achieve reasonable further progress towards the [CWA’s] goal of eliminating pollution.” *Id.*

As IDEM acknowledged, where EPA has not developed BPT or BAT limits for a particular industry or type of discharge, the permit writer may do so on a case-by-case basis using her “best professional judgment.”⁶⁷ *See also* 33 U.S.C. § 1342(a)(1)(B); 40 C.F.R. § 125.3. However, any

⁶⁵ Rec. Pt. 3: OALP000953 (NPDES Permit Factsheet).

⁶⁶ CWA Section 304(a)(4) identifies “conventional pollutants” to include biochemical oxygen demand (BOD5), total suspended solids (TSS), fecal coliform, pH, and any other pollutants EPA defines as conventional. On that front, EPA added “oil and grease” as a conventional pollutant.

⁶⁷ Rec. Pt. 3: OALP000952-53 (NPDES Permit Factsheet).

case-specific technology-based requirements for toxic pollutants⁶⁸ must still be based on the more stringent BAT level of pollution control. 40 C.F.R. § 125.3(a)(2)(iii)(B); *Sw. Elec. Power Co.*, 920 F.3d at 1006 (confirming that BAT “has applied to existing, direct discharges of toxic and non-conventional pollutants since March 31, 1989”).

Here, IDEM stated that it used its “best professional judgment” (“BPJ”) in setting case-specific technology-based requirements for Eagle Valley’s combined waste streams at the point of discharge—a fact that the ALJ also observed.⁶⁹ However, IDEM applied only the less stringent BPT limits for certain conventional pollutants but did not apply BAT, even though the discharge contains CCR contaminants that are on the list of 126 toxic “priority pollutants.”⁷⁰ And in that regard, a feasible, available waste treatment technology that can remove these toxic CCR contaminants from the effluent exists and is already being used at Eagle Valley to treat the polluted groundwater as soon as it enters the plant.⁷¹

As HEC explained in briefing, that means the appropriate BAT limit on coal ash contaminants in Eagle Valley’s combined discharge should be zero, or close to it,⁷² absent a determination that proper disposal 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. § 122.44(e) (requiring technology-based controls of toxic pollutants to control

⁶⁸ EPA has identified 65 pollutants and classes of pollutants as “toxic pollutants.” 40 CFR § 401.15. Of those, EPA designated 126 specific substances as “priority toxic pollutants.” <https://www.epa.gov/sites/default/files/2015-09/documents/priority-pollutant-list-epa.pdf>.

⁶⁹ Rec. Pt. 3: OALP000954 (NPDES Permit Factsheet); Rec. Pt. 6: OALP001977 (OEA Dismissal Order at 7, ¶15 (noting IDEM used its BPJ to calculate TBELs for the combined discharge)).

⁷⁰ Rec. Pt. 3: OALP000956-57 (NPDES Permit Factsheet).

⁷¹ Rec. Pt. 6: OALP002066, OALP002077 (Amended Petition at ¶¶ 12, 57).

⁷² IDEM acknowledges “the discharge of cooling tower blowdown is regulated by 40 CFR 423.13(d), which prohibits the discharge of the 126 priority pollutants . . . in detectable amounts with the exception of total zinc and total chromium.” However, IDEM gave AESI a pass on having to comply with this prohibition too. Rec. Pt. 3: OALP000954 (NPDES Permit Factsheet).

all such 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). No such determination has been made in this case.

And remarkably, all of this was presented to the ALJ,⁷³ who outright ignored it (even citing to the wrong page of HEC’s response brief) to summarily conclude that while HEC “believes” IDEM was required to impose BAT limits to “require proper disposal of CCR contaminants . . . HEC offers no cogent support for its contention that IDEM did not exercise BPJ or that BAT applied to the combined waste streams.”⁷⁴ Instead, the ALJ repeated, nearly verbatim, AESI’s view that “[t]he TBELs IDEM calculated for the combined discharge were based on and consistent with the applicable effluent guidelines established for each individual wastestream, adjusted to comply with antibacksliding requirements as required by 40 CFR § 423.12(b)(13).”⁷⁵

The problem with the ALJ’s unquestioned acceptance of AESI’s legal conclusion is that it is based on AESI’s flagrant misrepresentations of law and facts. To start, AESI insisted that “HEC is wrong” to “assert that IDEM must exercise BPJ and establish TBELs for CCR constituents based on BAT, *specifically at the location in the diagram above where reverse osmosis reject water is piped to the cooling tower*” because “[e]ffluent limitations (including technology-based ones) apply to the effluent [discharge] . . . [t]hey do not apply to internal wastestreams or pipes.”⁷⁶ But HEC never said that technology based effluent limits (“TBELs”) should apply to anything other than Eagle Valley’s *discharges* to the river.

⁷³ Rec. Pt. 6: OALP001986-89 (HEC Resp. to AESI and IDEM Motions to Dismiss at 6-9).

⁷⁴ Rec. Pt. 6: OALP001976 (OEA Dismissal Order at 6, ¶13 (citing page 12 of HEC’s response brief, which sets forth additional CWA authority requiring proper disposal of the internal waste stream, but has nothing to do with TBELs or IDEM’s exercise of BPJ)).

⁷⁵ Rec. Pt. 6: OALP001977 (OEA Dismissal Order at 7, ¶15); *compare to* Rec. Pt. 6: OALP002007 (AESI Reply in Support of Motion to Dismiss at 8).

⁷⁶ Rec. Pt. 6: OALP002008 (AESI Motion to Dismiss Reply at 9 (emphasis added)).

As HEC argued in response to IDEM and AESI’s motions to dismiss, the appropriate BAT limits of “zero, or close to it” should be set for the “coal ash contaminants in Eagle Valley’s *discharge*.”⁷⁷ And as AESI points out, a “discharge” is defined as the “addition of any pollutant to navigable waters from any point source.”⁷⁸ Thus, to say that HEC wants TBELs imposed on the pipe that directs the RO waste stream to the cooling tower, as AESI does, is specious.

What HEC did say is that the best available control technology itself—the BAT—on which the TBELs (effluent limits) should be based, is the RO treatment system used at Eagle Valley to remove coal ash contaminants from the pumped groundwater before it is used in the plant.⁷⁹ Since that technology is already in place, there is no legitimate reason why AESI cannot use it to meet BAT limits of zero at the point of discharge. As HEC’s Amended Petition plainly states, that can be achieved by requiring proper disposal of the secondary waste stream generated by the RO system instead of sending the waste to the river as the NPDES Permit allows. Nevertheless, the ALJ ignored this in her blind acceptance of AESI’s contrived argument.

Another example of this, AESI had to concede that 40 CFR 125.3(g) expressly requires “TBELs [to] 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.’” However, to side-step the requirement, AESI insisted it does not apply because the RO system treats “raw water” not “wastewater.”⁸⁰ There are three problems with this.

First, the notion that the contaminated groundwater treated by the RO system is “raw water” has no support in the facts alleged in HEC’s Amended Petition, which must be taken as

⁷⁷ Rec. Pt. 6: OALP001988 (HEC Resp. to IDEM and AESI Motions to Dismiss at 8).

⁷⁸ Rec. Pt. 6: OALP002007 (AESI Motion to Dismiss at 8, fn. 6 (citing 40 CFR 401.11(h)(1))).

⁷⁹ Rec. Pt. 6: OALP001988 (HEC Resp. to IDEM and AESI Motions to Dismiss at 8).

⁸⁰ Rec. Pt. 6: OALP002008 (AESI Motion to Dismiss Reply at 9).

true. Based on those pleading allegations (and the undisputed evidence for that matter), the groundwater pumped by the production wells is contaminated with coal ash waste (wastewater) from Eagle Valley's leaching coal ash waste ponds. And that is precisely why that wastewater is considered a "solid waste" regulated by both the CCR Rule and the CWA. *Supra* at 22-23.

Second, not a single word in 40 CFR 125.3(g) provides a carveout for a particular type of waste treatment system. The regulation states only that, "[t]echnology-based effluent limitations *shall* be established under this subpart 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." 40 C.F.R. § 125.3(g) (emphasis added). That is it. And notably, use of the word *shall* belies AESI's assertion that TBELs on pollutants in internal waste streams are somehow "permissive, not mandatory."⁸¹

Finally, even though AESI insisted on the one hand that 40 C.F.R. § 125.3(g) does not apply, AESI then declared that Eagle Valley's NPDES Permit complies with the rule anyway by "require[ing] solids, sludges, filter backwash, or other pollutants from or resulting from treatment or control of wastewaters *to be properly managed*."⁸² This is circular nonsense. Whether sludges and waste streams generally are being "properly managed" is not the issue here. The question is whether a BAT-based TBEL of zero should be placed on Eagle Valley's coal ash discharges to put an end to the current shell game of pumping and dumping a specific waste stream to the river, which is the crux of HEC's CCR Claim. Yet the ALJ ignored this too in uncritically coopting AESI's conclusion that IDEM did everything right.

⁸¹ Rec. Pt. 6: OALP002008 (AESI Motion to Dismiss Reply at 9).

⁸² Rec. Pt. 6: OALP002008 (AESI Motion to Dismiss Reply at 9).

Without question, HEC's CCR Claim states a viable claim for relief that the NPDES Permit violates the CWA and the CCR Rule by not requiring AESI to properly dispose of the internal waste stream generated by the RO treatment system in place at Eagle Valley. The ALJ's unlawful and patently biased conclusion otherwise misconstrues HEC's Amended Petition against HEC, ignores the relevant law, and is a clear abuse of agency discretion that should be reversed.

3. *The ALJ Erred in Dismissing HEC's Antidegradation Claim*

The ALJ 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 -6.⁸³ Again, in a one-sided adoption of AESI and IDEM's arguments, the ALJ concluded that this claim is "untimely" because HEC did not administratively appeal IDEM's issuance of a NPDES permit modification for AESI's planned conversion of Eagle Valley from a coal-burning to natural gas plant back in 2015.⁸⁴ This is wrong.

In issuing the 2015 permit modification, 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.⁸⁵ Yet, the ALJ agreed with AESI and IDEM's that the 2015 determination based on AESI's projections now bars any review of whether IDEM properly concluded in this case that the new mercury limits did not trigger antidegradation review.⁸⁶ This conclusion has no foundation in the law.

⁸³ Rec. Pt. 6: OALP002077 (Amended Petition at 17).

⁸⁴ Rec. Pt. 6: OALP001975-76 (OEA Dismissal Order at 5-6); *compare to* Rec. Pt. 6: OALP002045-46 (IDEM Motion to Dismiss at 12-13).

⁸⁵ Rec. Pt. 6: OALP002056 (AESI Motion to Dismiss at 8); Rec. Pt. 6: OALP002046 (IDEM Motion to Dismiss at 13).

⁸⁶ Rec. Pt. 6: OALP002057 (AESI Motion to Dismiss at 9); Rec. Pt. 6: OALP002046 (IDEM Motion to Dismiss at 13).

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 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. 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.”⁸⁷ That new agency decision, and the rationale for it, is subject to 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”).

⁸⁷ Rec. Pt. 6: OALP002078 (Amended Petition at ¶60).

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 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.⁸⁸

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.⁸⁹ And that agency action is reviewable on its own terms regardless of IDEM's past decisions.

Moreover, nothing in Indiana's antidegradation provisions support the ALJ'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

⁸⁸ Rec. Pt. 6: OALP002078-79 (Amended Petition at ¶62 (quoting the NPDES Permit Factsheet) (emphasis added)).

⁸⁹ Rec. Pt. 6: OALP002078-79 (Amended Petition at ¶¶60-63).

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 otherwise, as the ALJ 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.

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.⁹⁰ Thus, for the ALJ to conclude that IDEM’s new decision on antidegradation is not reviewable is patently contrary to law. HEC pled a colorable claim for relief that Eagle Valley’s NPDES Permit violates antidegradation standards. And the ALJ was wrong to dismiss it.

C. The OALP’s Final Order is Arbitrary, Capricious, an Abuse of Discretion, Contrary to Law Including Trial Rule 56, and Not Supported by a Preponderance of the Evidence

Indiana’s Administrative Orders and Procedures Act (“AOPA”) allows a party in an administrative proceeding to seek summary judgment “as to all or any part of the issues in a proceeding . . . under Trial Rule 56.” Ind. Code § 4-21.5 3-23(a), (b). In turn, Trial Rule 56 provides that summary judgment is appropriate if the designated evidentiary material shows that “there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” Ind. R. Trial P. 56(C).

“The party seeking the summary judgment has the burden of establishing that there are no genuine issues as to any material facts and any doubt must be resolved against the movant.”

⁹⁰ Rec. Pt. 3: OALP000955 (NPDES Permit Factsheet (emphasis added)).

Durakool, Inc. v. Mercury Displacements Indus., Inc., 422 N.E.2d 680, 682 (Ind. Ct. App. 1981). Stated differently, in determining whether a genuine issue exists, “the court will accept as true all facts alleged by the nonmoving party and resolve all doubts against the moving party.” *English Coal Co. v. Durcholz*, 422 N.E.2d 302, 307 (Ind. Ct. App. 1981). “Summary judgment is not an appropriate means of resolving questions of credibility of evidence or its weight, or even conflicting inferences which may be drawn from undisputed facts.” *Id.* (internal citation omitted). Thus, even a court believes the nonmoving party will not likely to prevail at trial, “it would not be authorized to grant summary judgment.” *Id.*

The ALJ failed to follow this established standard in issuing the OALP’s Final Order granting summary judgment for AESI and IDEM on HEC’s Mercury Claim, Cancer Criteria Claim, and the issue of HEC’s associational standing. At every turn, the ALJ disregarded the undisputed, material evidence designated by HEC—evidence that warranted summary judgment in HEC’s favor and, at minimum, precludes summary judgment for IDEM and AESI. And as with the ALJ’s prior dismissal of HEC’s CCR Claim and Antidegradation Claim, the ALJ’s summary judgment ruling co-opts AESI and IDEM’s arguments nearly verbatim, while failing to consider or engage in any meaningful way with HEC’s arguments. Accordingly, the Court should set aside the OALP’s Final Order as arbitrary, capricious, an abuse of discretion, contrary to law, and not supported by a preponderance of the evidence.

1. *The ALJ’s ruling that HEC lacks associational standing is contrary to law and procedure and not supported by a preponderance of the evidence*

In four conclusory paragraphs of its Final Order, the ALJ makes the sweeping conclusion that “HEC did not prove it has associational standing” because its members who live in

Martinsville “have suffered no injuries.”⁹¹ On its face, this conclusion is contrary to law. 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 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”).

More importantly, the ALJ’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 Env’tl. 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.)

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)).

⁹¹ Rec. Pt. 1: OALP000006-07 (OALP Final Order at 6-7).

The ALJ 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 coal ash pollution 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 the 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).

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 ALJ'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.

a. The ALJ Ignored Undisputed Material Evidence

In support of its conclusion that HEC lacks associational standing, the ALJ refers to the affidavits and discovery answers of HEC members Anna Radue, Roger Radue, and David McSwane,⁹² while completely ignoring the affidavits of HEC experts, Dr. Indra Frank and Mark A. Hutson, P.G., and HEC's discovery answers.⁹³ Collectively, these documents provide nearly

⁹² Rec. Pt. 1: OALP000003, OALP000006 (OALP Final Order at 3, 6).

⁹³ Rec. Pt. 2: OALP000636-37 (AESI's Designation of Evidence (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)).

100 pages of detailed and undisputed testimony and evidence that supports HEC's associational standing. Yet the ALJ devotes a single paragraph to mischaracterizing it, stating:

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 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.⁹⁴

But HEC's members had much more to say than that.

As their affidavits confirm, Anna and Roger Radue have lived in 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.⁹⁵

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

⁹⁴ Rec. Pt. 1: OALP000007 (OALP Final Order at 7).

⁹⁵ Rec. Pt. 6: OALP002086-87, OALP002090-91 (HEC Original Petition, Exhs. A and B).

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.⁹⁶

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.⁹⁷ On top of 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.⁹⁸

In their answers to AESI’s interrogatories, the Radues expanded on these concerns. And contrary to the ALJ’s finding that the Radue’s “activities around the White River have not changed as a result of the Permit”⁹⁹ 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

⁹⁶ Rec. Pt. 6: OALP002087-88, OALP002091-92 (HEC Orig. Pet., Exhs. A and B).

⁹⁷ Rec. Pt. 3: OALP000791-93, OALP000800-03 (AESI Designation of Evidence-Exh. 13 at pp. 4-6, Exh. 14 at pp. 4-7)); Rec. Pt. 6: OALP002088, OALP002092 (HEC Orig. Pet., Exh. A at 3; Exh. B at 3).

⁹⁸ Rec. Pt. 3: OALP000791-93, OALP000800-03 (AESI Designation of Evidence-Exh. 13 at pp. 4-6, Exh. 14 at pp. 4-7)); Rec. Pt. 6: OALP002089, OALP002093 (HEC Orig. Pet., Exh. A at 4; Exh. B at 4).

⁹⁹ Rec. Pt. 1: OALP000007 (OALP Final Order at 7).

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.

....

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.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

¹⁰⁰ Rec. Pt. 3: OALP000791-93 (AESI Designation of Evidence-Exh. 13 at pp. 4-6).

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 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.***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.¹⁰² 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 that are located in the White River floodplain.¹⁰³ He is particularly concerned that he and his wife will be exposed to hexavalent chromium in their drinking water because the City's water utility

¹⁰¹ Rec. Pt. 3: OALP000800-03 (AESI Designation of Evidence-Exh. 14 at pp. 4-7).

¹⁰² Rec. Pt. 6: OALP002094-95 (HEC Orig. Pet., Exh. C); Rec. Pt. 6: OALP002070 (HEC Amended Petition at 10, fn. 13).

¹⁰³ Rec. Pt. 6: OALP002094-95 (HEC Orig. Pet., Exh. C); Rec. Pt. 3: OALP000785 (AESI Designation of Evidence-Exh. 12 at p. 4).

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.”¹⁰⁴ None of this is mentioned anywhere in the ALJ’s conclusory ruling.

The ALJ also ignored the undisputed expert testimony designated by HEC confirming that the concerns of the Radues and David McSwane are credible and reasonable. Mark Hutson, an Indiana licensed professional geologist with 43 years of professional experience in hydrogeology, contaminated property investigation, and remediation, confirmed that people who 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.¹⁰⁵ 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.¹⁰⁶

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

¹⁰⁴ Rec. Pt. 6: OALP002095 (HEC Orig. Pet., Exh. C); Rec. Pt. 3: OALP000805-06 (AESI Designation of Evidence-Exh. 15 at pp. 1-2); Rec. Pt. 2: OALP000609 (AESI SJ Brief at 5).

¹⁰⁵ Rec. Pt. 6: OALP002097-99 (HEC Orig. Pet., Exh. D at 1-3).

¹⁰⁶ Rec. Pt. 6: OALP002098-99 (HEC Orig. Pet., Exh. D at 2-3).

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.¹⁰⁷

In addition to Mark Hutson's testimony, HEC designated the affidavit testimony of 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. Dr. Frank confirmed that the potential routes of human exposure to the coal ash contaminants from Eagle Valley, as identified by Mr. Hutson, pose serious health threats for people who are exposed to those contaminants. Specifically, based on her review of relevant records, Dr. Frank confirmed that Eagle Valley's continuous pollution discharges to the White River contain coal ash constituents including arsenic, boron, lithium, molybdenum, mercury, and likely hexavalent chromium, which are metals that do not biodegrade and are toxic to humans.¹⁰⁸

Dr. Frank explained 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.¹⁰⁹ Hexavalent chromium is likewise a potent carcinogen known to cause oral and intestinal cancers

¹⁰⁷ Rec. Pt. 6: OALP002098-99 (HEC Orig. Pet., Exh. D at 2-3).

¹⁰⁸ Rec. Pt. 6: OALP002102-05 (HEC Orig. Pet., Exh. E at 2-5).

¹⁰⁹ Rec. Pt. 6: OALP002103 (HEC Orig. Pet., Exh. E at 3).

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 deposited in the White River flood plain downstream, have good reason to be concerned about their health from possible exposure to these contaminants.¹¹⁰

Despite the well-established standard of review under Trial Rule 56(C), none of this uncontroverted testimony and evidence found its way into ALJ's limited factual findings. And contrary to the applicable law of AOPA standing, which the ALJ 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.

b. The ALJ disregarded the law of AOPA standing

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 OEA and does not require evidence of personal injury as the ALJ erroneously concluded. As an initial matter, the Indiana Supreme Court in *Huffman v. Ind. Office of Env'tl. Adjudication* made clear that the "judicial doctrine of standing" does not apply to administrative proceedings under AOPA "because AOPA itself identifies who may pursue an administrative proceeding." 811 N.E.2d 806, 809 (Ind. 2004). To that end, the Court clarified what it means to be "aggrieved or adversely affected," which is what AOPA requires for a party to have standing to seek administrative review.

¹¹⁰ Rec. Pt. 6: OALP002104-05 (HEC Orig. Pet., Exh. E at 4-5).

Specifically, the Court explained 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.” *Id.* 810-812. 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).

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. 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.

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.

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. Nevertheless, the ALJ parroted AESI's same argument that the Radues and David McSwane lack standing because their concerns are the same as every citizen of Martinsville.¹¹¹ Stated differently, the ALJ agreed with AESI that since everyone in town can 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.

In uncritically accepting AESI's view, the ALJ declared that the "Indiana's Supreme Court [in *Save the Valley*] 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.'"¹¹² Aside from the fact that *Save the Valley* is a decision of the Indiana Court of Appeals, not the Supreme Court, that is not what the court held. Rather, the appeals court in *Save the Valley* squarely rejected AESI's same argument that the ALJ blindly accepted in this case. In doing so, the court considered and rejected the same inapposite zoning decision that AESI's capable lawyers know does not apply to AOPA standing, yet, they relied on it anyway.

¹¹¹ Rec. Pt. 1: OALP000007 (OALP Final Order at 7); *compare to* Rec. Pt. 2: OALP000611 (AESI SJ Brief at 7).

¹¹² Rec. Pt. 1: OALP000007 (OALP Final Order at 7 (ostensibly quoting *Save the Valley*, 820 N.E.2d 677, 681)).

Specifically, in its summary judgment brief, AESI cited *Robertson v. Bd. of Zoning Appeals, Town of Chesterton*, 699 N.E.2d 310, 318 (Ind. Ct. App. 1998) for the proposition that “Indiana courts have squarely held that to establish statutory standing a party must identify ‘a special interest not common to the community as a whole.’”¹¹³ AESI cited *Robertson* even though the appeals court in *Save the Valley* “squarely held” that the *Robertson* decision has no application to understanding AOPA’s standing requirements for two key reasons. 820 N.E.2d at 681.

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. 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 groups’ 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 ALJ’s ruling, that the groups’ 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.

¹¹³ Rec. Pt. 2: OALP000611 (AESI SJ Brief at 7).

If that were not enough to dispel ALJ's unfounded ruling, 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 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").

Nothing in these decisions support ALJ's legal conclusion in this case 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. And all of this well-established and controlling Indiana precedent was presented to the ALJ 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. Yet, the ALJ flatly ignored it.¹¹⁴

Perhaps the ALJ overlooked the overwhelming evidence and mandatory legal authorities presented by HEC because the ALJ also ignored Indiana Trial Rule 56(A) in denying HEC's Cross-Motion for Summary Judgment on the Issue of Associational Standing ("HEC Cross-Motion") as "untimely," and striking HEC's consolidated brief filed in support of HEC's cross-motion and in opposition to AESI's summary judgment motion that raised the issue in the first place. *Infra* at 49-53. But whatever the reason, the ALJ's decision 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. The ALJ's erroneous ruling otherwise should be reversed.

c. The ALJ disregarded Trial Rule 56(A) in denying HEC's cross-motion for summary judgment on associational standing as "untimely" filed

As acknowledged by the ALJ, AESI challenged HEC's associational standing for the first time in the proceeding in its motion for summary judgment,¹¹⁵ even though such challenges are typically brought at the outset of through a motion to dismiss under Trial Rule 12(B)(6). *See Gilday & Assocs., P.C. v. Marion Cty. Assessor*, No. 21T-TA-00002, 2021 Ind. Tax LEXIS 38, at *9 (T.C. Sep. 15, 2021) ("because the standing requirement does not implicate a court's subject matter jurisdiction, an allegation that a party lacks standing is properly filed under Trial Rule 12(B)(6)," which also applies in administrative proceedings). The ALJ also noted that HEC responded to

¹¹⁴ Rec. Pt. 6: OALP2066-74 (Amended Petition at 6-14); Rec. Pt. 1: OALP000119-138 (HEC Consolidated SJ Resp. Brief at 9-28).

¹¹⁵ Rec. Pt. 1: OALP000082 (OALP Denial of HEC's Cross-Motion at 2, ¶4).

AESI's motion for summary judgment on this specific issue by filing a cross-motion for summary judgment¹¹⁶ as expressly allowed by Trial Rule 56(A) (“[a] party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may . . . after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.”)

Nevertheless, in the ALJ's unfettered acceptance of just about every argument advanced by AESI, the ALJ ignored TR 56(A) and denied HEC's cross-motion as “untimely” because it was filed on the case management deadline for filing responses. Specifically, the ALJ adopted verbatim AESI's assertion that since the cross-motion is “indubitably a dispositive motion,” HEC should have moved for summary judgment on this issue by the deadline for filing “*all Dispositive Motions.*”¹¹⁷

The ALJ's ruling flies in the face of long-established and, indeed, *routine* practice in Indiana for a party to respond to his opponent's motion for summary judgment by filing a cross-motion for summary judgment as unambiguously allowed by TR 56(A). For instance, in *Sargent v. State*, the Indiana Supreme Court noted the unremarkable procedural history of the State first “mov[ing] for summary judgment on its forfeiture complaint and Sargent respond[ing] with a cross-motion for summary judgment.” 27 N.E.3d 729, 731 (Ind. 2015). Similarly, in *Ohio Cas. Ins. Co. v. State*, the Indiana Court of Appeals observed the routine procedural history of the State filing a motion for partial summary judgment, and Ohio Casualty responding by filing a cross motion for summary judgment. 167 N.E.3d 784, 787 (Ind. Ct. App. 2021). In *Gillespie v. Niles*,

¹¹⁶ Rec. Pt. 1: OALP000082 (OALP Denial of HEC's Cross-Motion at 2, ¶4); Rec. Pt. 1: OALP000107 (HEC Cross-Motion for Summary Judgment on Associational Standing).

¹¹⁷ Rec. Pt. 1: OALP000082 (OALP Denial of HEC's Cross-Motion at 2, ¶4); *compare to* Rec. Pt. 1: OALP000093 (AESI Objection to HEC's Cross-Motion at 2).

the Indiana Court of Appeals recited without concern the procedural history of the defendants filing a motion for summary judgment and, plaintiffs “fil[ing] a response to the [d]efendants’ motion for summary judgment and a cross-motion for summary judgment.” 956 N.E.2d 744, 746 (Ind. Ct. App. 2011).

There are literally hundreds of cases where trial courts have allowed this routine practice and appellate courts have observed it without raising any concern that it violates procedural rules or case management deadlines. *See e.g., Paul v. Home Bank SB*, 953 N.E.2d 497, 501 (Ind. Ct. App. 2011) (affirming the trial court’s grant of an enlargement of time for defendant to file a response to plaintiffs’ cross-motion for summary judgment that was filed in response to the defendant’s summary judgment motion); *First Farmers Bank & Tr. Co. v. Whorley*, 891 N.E.2d 604, 607 (Ind. Ct. App. 2008) (noting the procedural history of defendant moving for partial summary judgment and plaintiff filing its response in opposition and cross-motion for summary judgment two months later); *Lake States Ins. Co. v. Tech Tools*, 743 N.E.2d 314, 316-17 (Ind. Ct. App. 2001) (reciting the procedural history of plaintiff moving for summary judgment and defendants filing a cross-motion for summary judgment two months later). Not one of these court decisions have anything to say about the unremarkable fact that parties in litigation often respond to their opponents’ summary judgment motions by filing cross-motions for summary judgment.

HEC brought these cases to the ALJ’s attention¹¹⁸ who flatly ignored them. The ALJ also ignored the fact that Barnes & Thornburg, the law firm that represents AESI in this case, has regularly responded to adversaries’ summary judgment motions by filing cross-motions for summary judgment on behalf of the firm’s clients.¹¹⁹ *See e.g., Town of Reynolds v. Bd. of Comm’rs*,

¹¹⁸ Rec. Pt. 1: OALP000084-000085 (HEC Resp. to AESI Obj. to HEC Cross-Motion at 2-3).

¹¹⁹ Rec. Pt. 1: OALP000085-000086 (HEC Resp. to AESI Obj. to HEC Cross-Motion at 3-4)

62 N.E.3d 394, 397 (Ind. Ct. App. 2016) (noting the procedural history of the Town moving for partial summary judgment, and a month later, the County, represented by Barnes & Thornburg “filed a cross-motion for summary judgment together with a designation of evidence in support of their motion and a brief in support of their motion and in opposition to the Town’s motion for partial summary judgment”); *Mirant Sugar Creek, LLC v. Ind. Dep’t of State Revenue*, 930 N.E.2d 697, 699 (Ind. T.C. 2010) (observing the procedural history of the defendant state agency moving for summary judgment, and the petitioner, represented by Barnes & Thornburg, filing a cross-motion for summary judgment in response); *S. Cent. Bank v. Lynnville Nat’l Bank*, 901 N.E.2d 576, 579 (Ind. Ct. App. 2009) (noting the procedural history of the appellant moving for summary judgment, and the appellee, represented by Barnes & Thornburg responding three months later by filing a cross-motion for summary judgment). Yet, the ALJ’s ignored this too.

There is simply no legitimate reason to hold HEC to a different procedural standard than what AESI’s own counsel follows. And there is certainly no legitimate basis for ALJ to deny HEC’s cross-motion on the critically important threshold issue of HEC’s standing to pursue this case, when HEC did nothing more than what the trial rules allow. Such an abuse of discretion is patently unlawful and unjust.

Moreover, the ALJ’s conclusion that HEC somehow violated the scheduling order that governed the proceeding below, has no foundation in the scheduling order itself. To start, the order did not set a deadline for filing “all” dispositive motions. It set a deadline for filing “Dispositive Motions.” The word “all” is nowhere to be found in the order.¹²⁰ Also missing from the scheduling order is any indication that the filing deadline was intended to alter the application of TR 56(A) or otherwise preclude a party from responding to an issue raised in an adverse party’s motion for

¹²⁰ Rec. Pt. 1: OALP000098 (Case Management Order at 1 (Aug. 26, 2024)).

summary judgment by filing a cross-motion for summary judgment on the issue. Instead, the court's scheduling order simply states that "Responses to dispositive motions shall be filed thirty (30) days after any dispositive motion is filed."¹²¹ And that deadline was extended by thirty days by agreement of the parties.¹²² There is no question that HEC complied with both of these deadlines.

On the dispositive motion filing deadline, HEC moved for partial summary judgment on the two claims that had not been dismissed. HEC did not seek summary judgment on the issue of associational standing, which was its right. Ind. R. Trial P. 56(A) (a party may move "for a summary judgment in his favor upon all or any part" of the party's claim); Ind. R. Trial P. 56(C) ("A summary judgment may be rendered upon less than all the issues or claims.") However, AESI did raise the issue of associational standing to which HEC timely responded by cross-moving for summary judgment on the issue, which was also HEC's right to do. There is simply no legal authority that supports the ALJ's conclusion that HEC's cross-motion was not timely filed.

d. Striking HEC's consolidated response brief was an abuse of discretion

In the process of erroneously denying HEC's cross-motion for summary judgment, the ALJ also struck HEC's consolidated response brief filed both in support of HEC's cross-motion on associational standing and in opposition to AESI's motion for summary judgment on HEC's pending claims and associational standing. The ALJ did so at AESI's insistence because the consolidated brief, at 35 pages in substance,¹²³ exceeded the OALP's 30-page limit on briefs set

¹²¹ Rec. Pt. 1: OALP000099 (Case Management Order at 2)

¹²² Rec. Pt. 1: OALP000102 (Order Granting 30-Day Extension of Remaining Case Management Deadlines (Sept. 10, 2024))

¹²³ With the caption, certificate of service, and signature page included, the brief is 38 pages.

forth in 315 IAC 1-3-4(d).¹²⁴ Imposing such a harsh sanction for a technical rule violation was an abuse of the ALJ's discretion and highly prejudicial to HEC.

While courts have 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). To that end, the Indiana Supreme Court confirmed that courts should refrain from imposing severe penalties for rule violations unless a violation is egregious, made in bad faith, or prejudices the opposing party. *Id.* None of those factors are present here and the ALJ did not find, and could not have found, otherwise.

As HEC explained to the ALJ in apologizing for the exceedance, the error was inadvertent. Not only that, but HEC could have submitted two 30-page briefs: one in response to AESI's motion for summary judgment and one in support of HEC's cross-motion.¹²⁵ Thus, HEC's submission of one consolidated brief was a much more efficient and concise way to present HEC's arguments on these two motions. Plainly, there is no evidence of egregious or bad faith behavior on HEC's part. Nor did the 5-page exceedance prejudice the Respondents in any way. On the other hand, striking HEC's consolidated response brief was highly prejudicial to HEC.

Indeed, as apparent throughout the OALP's Final Order, the ALJ did not consider any of the evidence, legal authorities, or arguments presented by HEC in its consolidated brief on the issue of associational standing and the merits of HEC's Mercury Claim and Cancer Criteria Claim. As a consequence, the ALJ could not and did not fairly consider and decide the merits of those claims. Such an unjust abuse of discretion should not be countenanced by the Court.

¹²⁴ Rec. Pt. 1: OALP000082 (OALP Denial of HEC's Cross-Motion at 2, ¶5).

¹²⁵ Rec. Pt. 1: OALP000087-88 (HEC Resp. to AESI Obj. to HEC's Cross Motion at 5-6).

2. *The ALJ Erred in granting summary judgment for Respondents on the Mercury Claim*

Like the ALJ's other rulings in this case, the ALJ's grant of summary judgment for Respondents on HEC's Mercury Claim depends on blind acceptance of Respondents' arguments that misconstrue HEC's claim and misstate the law applicable to that claim. Indeed, the ALJ's ruling on this issue is a literal cut and paste right out of AESI's brief. The ruling begins with a cut and paste of AESI's assertion that HEC is wrong to claim "that 327 IAC 5-2-11.1(b)(6) *prohibits* IDEM from issuing an NPDES permit with a maximum daily limit of 20 ng/l" because the claim does "not consider the differences between water quality standards and maximum daily and average monthly effluent limits and the processes for generating these distinct limitations."¹²⁶ That is followed by a near verbatim repetition of AESI's discussion of the differences between the two limits including calculations IDEM used to derive the limits. And that culminates with the ALJ repeating AESI's conclusion that "HEC's contention that IDEM simply adopts the minimum water quality criteria for both limits is without merit."¹²⁷

But as HEC pointed out in its consolidated response brief (which the ALJ failed to consider after erroneously striking it) all of this discussion, while interesting, is entirely *irrelevant* to what HEC actually claims.¹²⁸ Nowhere in HEC's amended petition or answers to written discovery on this issue has HEC ever said that IDEM is outright prohibited from setting a maximum daily limit ("MDL") of 20 ng/l for mercury or that "IDEM simply adopts the minimum water quality criteria" in setting permit limits. What HEC has consistently said is that setting an MDL of 20 ng/l combined

¹²⁶ Rec. Pt. 1: OALP000008 (OALP Final Order at 8, ¶3 (emphasis added)); *compare to* Rec. Pt. 2: OALP000617 (AESI SJ Brief at 13).

¹²⁷ Rec. Pt. 1: OALP000008-11 (OALP Final Order at 8-11 (emphasis added)); *compare to* Rec. Pt. 2: OALP000617-19 (AESI SJ Brief at 13-15).

¹²⁸ Rec. Pt. 1: OALP000138 (HEC Consolidated SJ Resp. at 28).

with a monitoring *infrequency* 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").¹²⁹ The regulation says so. And IDEM said so in issuing Eagle Valley's Permit:

Mercury is listed as a bioaccumulative chemical of concern (BCC) under 327 IAC 2-1-9(5). Mixing zones for all discharges of BCCs to waters in the non-Great Lakes system are prohibited after January 1, 2004. Therefore, the criteria for mercury were applied to the undiluted discharge in accordance with 327 IAC 5-2-11.1(b)(6).¹³⁰

And critically, IDEM admitted that if the one required grab sample taken every other month meets the daily maximum limit of 20 ng/l, it will violate the monthly average limit of 12 ng/l and the WQC for mercury.¹³¹ These facts are dispositive of HEC's Mercury Claim.

All NPDES permits must include water quality-based effluent limitations ("WQBELs") that "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); 327 IAC 5-2-11.1(h). If the permitting authority makes such a determination, as IDEM did here with respect to mercury, the agency must include in the NPDES permit "any requirements in addition to or more stringent than promulgated effluent limitations guidelines or standards under sections 301, 304, 306, 307, 318, and 405 of the CWA [as] necessary to achieve

¹²⁹ See e.g., Rec. Pt. 5: OALP001851 (HEC MFSJ Exh. H (HEC's Ans to AESI's Interrogatories 2 and 3)).

¹³⁰ Rec. Pt. 3: OALP000994 (HEC MFSJ Exh. E-NPDES Permit Wasteload Allocation Analysis).

¹³¹ Rec. Pt. 3: OALP000873 (HEC MFSJ Exh. D-IDEM's Ans to HEC Interrogatory 12); see also Rec. Pt. 2: OALP000623 (AESI SJ Brief at 19).

water quality standards established under section 303 of the CWA, including State narrative criteria for water quality.” 40 CFR § 122.44(d)(1) (emphasis added).

Indiana’s water quality standards are “established through the criteria set forth in 327 IAC 2-1-6 and 327 IAC 2-1-8.9 or under the procedures described in 327 IAC 2-1-8.2 through 327 IAC 2-1-8.6 and 327 IAC 2-1-8.9.” 327 IAC 5-2-11.1(a). These standards are “the basis for . . . WQBELs applicable to point source discharges, [outside of] the Great Lakes system, through NPDES permits,” 327 IAC 5-2-11.1(a)(1), and require that “[a]ll surface waters outside of mixing zones must be free of substances in concentrations that, on the basis of available scientific data, are believed to be sufficient to injure, be chronically toxic to, or be carcinogenic, mutagenic, or teratogenic to humans, animals, aquatic life, or plants.” 327 IAC 2-1-6(a)(2).

On that front, Indiana has determined that surface water concentrations of mercury must not exceed a four-day average of 12 ng/l “to protect aquatic life from [its] chronic toxic effects.” 327 IAC 2-1-6(a)(2)(A), (a)(3) Table 6-1 (referred to as the “Chronic Aquatic Criterion” or “CAC”). And because mercury is a BCC, 327 IAC 2-1-6(a)(3) Table 6-1, any WQBEL for mercury must apply this CAC “directly to the undiluted discharge for all discharges.” 327 IAC 5-2-11.1(b)(6). In other words, no dilution or mixing zones are allowed in setting a WQBEL for mercury. “[T]he relevant water quality criterion must be attained at the point of discharge.” U.S. EPA, NPDES Permit Writers’ Manual, Ch. 6: Water Quality-Based Effluent Limitations, 6-16 (Sept. 2010).¹³² Thus, while AESI is correct that water quality standards dictate “the overall conditions” that a waterbody must achieve,¹³³ when it comes to a BCC like mercury those conditions must be met at the point of discharge, not at some point downstream.

¹³² Rec. Pt. 5: OALP001878 (HEC MFSJ Exh. I-EPA NPDES Permit Writer’s Manual at pdf p. 16).

¹³³ Rec. Pt. 2: OALP000617 (AESI SJ Brief at 13).

Furthermore, all NPDES permits must include monitoring requirements that “assure compliance” with all permit limitations, terms, and conditions. 40 CFR § 122.44(i); 327 IAC 5-2-13(a). As such, monitoring requirements 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) (stating the “monitoring frequency, type, and intervals [must be] sufficient to yield continuing data representative of the volume of effluent flow and the quantity of pollutants discharged based on the impact of the waste stream on the receiving water”). Plainly, a monitoring frequency that “yields” no data six months of the year does not meet this test, especially when the discharge is a continuous one.

For that matter, EPA’s Technical Support Document (“TSD”) guidance that the ALJ said IDEM followed in calculating permit limits in this case¹³⁴ makes clear that in calculating an average monthly effluent limit for a BCC like mercury where the “criterion is applied at the end of the pipe,” at least four monthly samples should be assumed in the calculation to avoid the very situation at issue here where the discharger complies with the permit limit but exceeds the criterion.¹³⁵ Contrary to this guidance, IDEM’s technical spreadsheet of calculations confirms that IDEM derived the effluent limits for mercury based on a single monthly sample.¹³⁶

Not only that, but EPA’s TSD that IDEM purportedly followed, provides a list of factors that should have been considered by IDEM in selecting an appropriate monitoring frequency.¹³⁷

Nowhere in the NPDES Permit, the supporting technical documents, or IDEM’s fact sheet does it

¹³⁴ Rec. Pt. 1: OALP000009-10 (OALP Final Order at 9-10).

¹³⁵ Rec. Pt. 1: OALP000280-83 (HEC SJ Exh. K (EPA’s TSD at pp. 107-110)).

¹³⁶ Rec. Pt. 2: OALP000691 (AESI’s Designation of Evidence-Exh. 4 at p. 3)).

¹³⁷ Rec. Pt. 1: OALP000286 (HEC SJ Exh. K-EPA’s TSD at p. 113)).

indicate that IDEM considered any of those factors here. 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.¹³⁸ Without question, none of that was done here by IDEM. Instead of requiring Eagle Valley to take the “ideal 10 or more samples per month” or imposing a monitoring frequency that resembles anything close to a “reasonable compromise,” the NPDES Permit requires AESI to take a single monthly sample every other month, while giving the company a complete pass on sampling for mercury in the other six months of the year.

Failing to mention any of this in its one-sided ruling, the ALJ instead adopted AESI’s yarn about how HEC got it all wrong since the rules give IDEM discretion to select a monitoring frequency. According to AESI’s view, repeated by the ALJ, this discretion allows IDEM to impose a mercury monitoring frequency of just six times a year in this case, because IDEM has imposed that same monitoring frequency in a laundry list of other industrial NPDES permits.¹³⁹ In other words, IDEM can do whatever it wants so long as that is what the agency has always done. But doing the wrong thing over and over again does not make it lawful.

It is well-settled that administrative agency decisions must be based on written, ascertainable standards that are available to the public. *Podgor v. Ind. Univ.*, 381 N.E.2d 1274, 1283 (Ind. Ct. App. 1978). “This requirement is to make certain that administrative decisions are fair, orderly and consistent rather than irrational and arbitrary.” *Id.* Accordingly, “[t]he standards should be written with sufficient precision to give fair warning as to what the agency will consider

¹³⁸ Rec. Pt. 1: OALP000286 (HEC SJ Exh. K-EPA’s TSD at p. 113 (emphasis added)).

¹³⁹ Rec. Pt 1: OALP000011-12 (OALP Final Order at 11-12, fn. 44); *compare to* Rec. Pt. 2: OALP000621-22 (AESI SJ Brief at 17-18, fn. 4).

in making its decision” and “should be readily available to those having potential contact with the administrative body.” *Id.*

For instance, in *Bankview Farm II, Inc. v. Indiana Department of Environmental Management*, the Grant Circuit Court overturned a wetland determination that IDEM conducted following the agency’s unwritten, unpromulgated “historical practice” for conducting such determinations. Cause No. 27C01-2307-MI-000067 (Grant Circuit Court, July 2, 2024).¹⁴⁰ Like IDEM’s unwritten practice of requiring industrial dischargers of mercury to sample just six times per year, IDEM had an unwritten practice of following the Army Corps’ wetland determination process, which led IDEM to conclude that a portion of Bankview’s property had regulated wetlands that he had unlawfully filled. *Id.* at 1-2, 4, 6. The court vacated IDEM’s wetland determination as invalid and contrary to law because “IDEM never went through the required rulemaking process for its wetland determination procedure” and “did not even write the policy down.” *Id.* at 20-22. There is no reason for a different outcome here.

The fact that there are no “specific monitoring frequencies” spelled out in IDEM’s rules is cause to reject IDEM’s unwritten, unpromulgated historic practice of giving major industrial dischargers of mercury a complete pass on sampling for mercury 359 days of the year. It certainly does not give IDEM unfettered discretion, as the ALJ concluded, to do whatever it wants in total disregard of the CWA, its implementing regulations, and the very EPA TSD guidance that IDEM purportedly relied on.

Nor does it matter that AESI could choose to monitor more frequently as AESI argued.¹⁴¹ Again, IDEM must impose monitoring requirements that “assure compliance” with the Permit’s

¹⁴⁰ Rec. Pt. 2: OALP000534 (HEC MFSJ Exh. R-Court Order in *Bankview Farm II v. IDEM*).

¹⁴¹ Rec. Pt. 2: OALP000623 (AESI SJ Brief at 19).

mercury limits. 40 CFR § 122.44(i); 327 IAC 5-2-13(a). Nowhere do the rules say that IDEM can just leave it up to a regulated entity to decide when and whether it wants to sample. And requiring a grab sample just six times a year and giving a pass on sampling the rest of the year in no way provides any assurance that Eagle Valley is complying with the permit's mercury limits or the WQC for mercury.

Ignoring all of this, the ALJ remarkably concluded that “HEC provides no legal support for its conclusion or explain how the Permit's frequency does not comply with 327 IAC 5-2-13” and “offers no alternative frequency it believes IDEM was required by law to include in the Permit thereby failing to comply with IC § 13-15-6-2(6).”¹⁴² This conclusion not only flatly disregards the detailed discussion of the evidence and law that HEC provided,¹⁴³ it also misconstrues the pleading requirement of Indiana Code § 13-15-6-2(6), which has nothing to do with a non-moving party's burden at summary judgment.

Indiana Code § 13-15-6-2(6) requires a petition for review to “[i]dentify the permit terms and conditions that, in the judgment of the person making the request, would be appropriate in the case in question to satisfy the requirements of the law governing permits of the type granted or denied by the commissioner's action.” It does not 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 at summary judgment. Indeed, the Indiana Court of Appeals in *Ind. Office of Env'tl. Adjudication, Dep't of Env'tl. Mgmt. v. Kunz*, long ago made this clear, explaining that a petition for administrative review “need not enumerate precisely every event to which a hearing examiner may finally attach significance” such that

¹⁴² Rec. Pt. 1: OALP000012 (OALP Final Order at 12, ¶13).

¹⁴³ Rec. Pt. 1: OALP000138-143 (HEC Consolidated Resp. Br. at 28-33).

“[r]eversal shall not occur absent evidence that a party is misled by an administrative complaint, resulting in prejudicial error.” 714 N.E.2d 1190, 1195-96 (Ind. Ct. App. 1999).

Furthermore, the ALJ’s ruling side-steps the requirements of Trial Rule 12(B)(6). As the appeals court in *Kunz* explained, the pleading requirements of Indiana Code § 13 15-6-2 are not a matter of subject matter jurisdiction and thus a petitioner must be afforded an opportunity to amend his administrative petition if it does not meet the statute’s requirements as allowed under TR 12(B). 714 N.E.2d at 1194; Ind. R. Trial P. 12(B) (“[w]hen a motion to dismiss is sustained for failure to state a claim under subdivision (B)(6) of this rule the pleading may be amended once as of right pursuant to Rule 15(A) within ten [10] days after service of notice of the court’s order.”) In other words, if the Respondents believe HEC’s administrative petition violates Indiana Code § 13 15-6-2, they had every opportunity to raise issue in their TR 12(B)(6) motions to dismiss; they did not. Their failure and the ALJ’s decision at the summary judgment stage that HEC’s petition is somehow deficient, prevented HEC from being able to correct the purported deficiency.

In any event, 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).¹⁴⁴ Since the undisputed evidence shows that IDEM did not do that here, the ALJ should have granted summary judgment for HEC on this issue. Accordingly, this Court should correct the ALJ’s unlawful ruling and reverse it.

3. *The ALJ Erred in granting summary judgment for Respondents on the Cancer Criteria Claim*

As the ALJ confirmed, 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

¹⁴⁴ Rec. Pt. 5: OALP002079-80 (Amended Petition at 19-20, ¶66).

thousand (100,000) population.”¹⁴⁵ Nevertheless, the ALJ accepted IDEM’s view that because this criterion is in narrative form, not numeric, the agency was not required to evaluate whether the known carcinogens IDEM identified in Eagle Valley’s wastewater discharges to the White River have a reasonable potential to exceed this criterion.¹⁴⁶ This was clear error.

The CWA expressly states that the absence of numeric criteria is not a valid reason to avoid conducting the reasonable potential analysis. Instead, CWA 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). 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).

Nevertheless, adopting IDEM’s view, the ALJ proclaimed that the agency has “discretion” not to conduct a reasonable potential analysis. In support, the ALJ cited to the *draft* of 40 CFR §

¹⁴⁵ Rec. Pt. 1: OALP000013 (OALP Final Order at 13 (citing 327 IAC 2-1-6(a)(2)(A)(iv)).

¹⁴⁶ Rec. Pt. 1: OALP000013 (OALP Final Order at 13); Rec. Pt. 3: OALP001003-04 (NPDES Permit Attachment 8); Rec. Pt. 5: OALP001843-44 (IDEM Answers to Requests to Admit 1-7); Rec. Pt. 3: OALP000870-71 (IDEM Answers to Interrogatories 5, 6 and 7).

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.”¹⁴⁷ The problem with this is that IDEM did identify the *known* carcinogens in Eagle Valley’s discharges as “pollutants of concern,” and in fact evaluated their reasonable potential to exceed Indiana’s water quality criteria that are in *numeric* form.¹⁴⁸ IDEM simply chose not to conduct the reasonable potential analysis for Indiana’s human health cancer criterion because it is in narrative form, contrary to the draft of 40 CFR § 122.44(d).

Nevertheless, the ALJ agreed with IDEM that the distinction between numeric and narrative criteria somehow allows IDEM to ignore the narrative criteria when conducting the reasonable to exceed analysis.¹⁴⁹ Yet, 40 CFR § 122.44(d) on which the ALJ relied plainly states otherwise—“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.

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

¹⁴⁷ Rec. Pt. 1: OALP000013 (OALP Final Order at 13); *compare to* Rec. Pt. 2: OALP000564 (IDEM SJ Resp. at 11 (quoting 54 Fed. Reg. 23868 (Jun. 2, 1989))).

¹⁴⁸ Rec. Pt. 3: OALP001003 (NPDES Permit-Attachment 8 (calculating preliminary effluent limits for the identified carcinogens-- arsenic, beryllium, cadmium, and lead—based on *numeric* water quality criteria)).

¹⁴⁹ Rec. Pt. 1: OALP000012-13 (OALP Final Order at 12-13); *compare to* Rec. Pt. 2: OALP000563-000564 (IDEM SJ Resp. at 10-11).

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).

Notably, all of this is echoed in Section 5.1.1 of EPA's Technical Support Document ("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 3.¹⁵⁰

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)(1)(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)(1)(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.¹⁵¹

Remarkably, none of this critical EPA guidance or legal authorities made their way into the ALJ's three-paragraph, conclusory, and one-sided decision on this issue. Instead, the ALJ parrots

¹⁵⁰ Rec. Pt. 1: OALP000266 (EPA Technical Support Document at 93).

¹⁵¹ Rec. Pt. 1: OALP000235 (EPA TSD at 62).

AESI's argument 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.¹⁵² But the problem with this is that the provision simply carries out the directive in 40 CFR 122.44(d)(1)(vi) that governs agency discretion in choosing *how*, not *whether*, to conduct the reasonable potential analysis.

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.” 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 ALJ concluded.

Even so, the ALJ went on to adopt 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.¹⁵³ 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

¹⁵² Rec. Pt. 1: OALP000011-12 (OALP Final Order at 11-12); *compare to* Rec. Pt. 2: OALP000585-86 (AESI SJ Resp. at 15-16).

¹⁵³ Rec. Pt. 1: OALP000013 (OALP Final Order at 13); *compare to* Rec. Pt. 2: OALP000587 (AESI SJ Resp. at 17).

Valley's uncontrolled discharges of carcinogens to the White River.¹⁵⁴ And common sense dictates that eliminating a cancer threat is a benefit to human health.

Furthermore, EPA's TSD that IDEM supposedly followed in this case 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 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)(1)(vi)."¹⁵⁵

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

¹⁵⁴ Rec. Pt. 6: OALP002102-05 (Indra Frank Affidavit at 2-5).

¹⁵⁵ Rec. Pt. 1: OALP000210 (EPA's TSD at p. 36 (emphasis added)).

in Section 2.4.8 should be used as it will result in the more stringent RAC of the two.¹⁵⁶

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 ALJ rubber-stamped that unconscionable decision without any consideration or analysis of the facts and law that HEC presented on this issue.

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 ALJ'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 the permit limits, relieve IDEM of its statutory obligation to determine if it would have made a difference.

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 ALJ should have granted summary judgment for HEC on this issue.

Conclusion:

The ALJ's Final Order 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

¹⁵⁶ Rec. Pt. 1: OALP000211-14 (EPA's TSD at p. 37-40).

violation of the plain language and intent of the CCR Rule and the CWA. The ALJ'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 each of the ALJ's three rulings that make up the OALP's Final Order, the ALJ ignored fundamental procedural and evidentiary standards under Trial Rules 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 evidence and arguments. Accordingly, the OALP's Final Order 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 ALJ's unsupported factual findings or unlawful conclusions of law.

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 Final Order and remand the matter back to IDEM with instructions to approve a modified NPDES Permit that fully complies with applicable federal and state law.

Respectfully submitted,

/s/ Kim E. Ferraro

Kim E. Ferraro, Attorney No. 27102-64

Conservation Law Center

116 South Indiana Avenue

Bloomington, Indiana 47408

812/856-5737

kimferra@iu.edu

CERTIFICATE OF SERVICE

I certify that the foregoing document was served upon the following attorneys of record via Court's electronic filing system on this 21st day of July, 2025:

E. Sean Griggs
Alexandra R. French
Kathleen Waak
Barnes & Thornburg, LLP
11 S. Meridian Street
Indianapolis, Indiana 46204
Sean.Griggs@btlaw.com
afrench@btlaw.com
Kathleen.waak@btlaw.com

Emily A. Witker
Meredith McCutcheon,
Office of Attorney General Todd Rokita
Indiana Government Center South
5th Floor
Indianapolis, Indiana 46204
Emily.Witker@atg.in.gov
Meredith.McCutcheon@atg.in.gov

/s/ Kim E. Ferraro _____