IN THE
INDIANA COURT OF APPEALS

Case No. 26A-RA-02544

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| HOOSIER ENVIRONMENTAL COUNCIL,<br><br>Appellant-Petitioner,<br><br>v.<br><br>INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, and INDIANAPOLIS POWER & LIGHT COMPANY d/b/a AES INDIANA-EAGLE VALLEY GENERATING STATION,<br><br>Appellees-Respondents. | ) Appeal from the Morgan Circuit Court,<br>) Cause No: 55C01-2503-RA-691<br>) The Honorable Matthew G. Hanson, Judge |

# BRIEF OF APPELLANT HOOSIER ENVIRONMENTAL COUNCIL

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BRIEF OF APPELLANT HOOSIER ENVIRONMENTAL COUNCIL

## I. STATEMENT OF ISSUES

**Issue I. (Dismissal Under Trial Rule 12(B)(6)):**

Under Indiana law, an administrative petition challenging a Clean Water Act ("CWA") permit should not be dismissed for failure to state a claim unless it appears to a certainty that the petitioner would not be entitled to relief under any set of facts. The CWA also requires permitting agencies to impose technology-based effluent limitations on toxic pollutants not covered by industry-wide effluent guidelines and to conduct antidegradation review when a deliberate change in operations results in new or increased pollutant discharges.

Here, the Hoosier Environmental Council ("HEC") alleged specific facts that the CWA Permit issued by the Indiana Department of Environmental Management ("IDEM") for the AES Indiana-owned Eagle Valley Generating Station ("Eagle Valley") in Martinsville: (1) failed to

require disposal of a waste stream containing toxic coal ash pollutants removed by a technology that treats Eagle Valley's intake water and, instead, allows the untreated waste stream to be discharged to the White River; and (2) included new effluent limits for mercury due to operational changes at Eagle Valley without requiring antidegradation review. Did the trial court err in affirming the dismissal of these claims under Trial Rule 12(B)(6) when HEC's administrative petition states these operative facts?

**Issue II. (Summary Judgment Under Trial Rule 56):**

Under Indiana law, summary judgment is appropriate only when the designated evidence establishes that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. In turn, the CWA requires NPDES permits to impose monitoring that is sufficient to assure compliance with permit limits and yield data representative of the monitored activity. It also requires permitting agencies to evaluate whether pollutant discharges have a reasonable potential to exceed applicable water-quality criteria, whether numeric or narrative.

Here, the undisputed evidence establishes that: (1) the applicable water quality criterion for mercury is 12 nanograms per liter ("ng/l") over a four-day average that must be met at the point of discharge because mercury is a bioaccumulative chemical of concern; (2) the Permit sets a maximum daily effluent limit for mercury at 20 ng/l, above the water quality criterion, and an average monthly limit of 12 ng/l consistent with the criterion; (3) to monitor compliance with both limits, the Permit requires AES Indiana ("AESI") to take one grab sample every other month; (4) IDEM made a sworn admission that a sample measuring 20 ng/l would comply with the daily maximum limit while violating the monthly average limit of 12 ng/l; and (5) in deriving water quality based effluent limits, IDEM did not evaluate whether known carcinogens in Eagle Valley's discharges have a reasonable potential to exceed Indiana's narrative criterion for protecting human

health from cancer. Did the trial court err in affirming summary judgment for AESI and IDEM, instead of HEC, when these facts establish violations of the CWA as a matter of law?

**Issue III. (Associational Standing):**

Under the Administrative Orders and Procedures Act ("AOPA") and the three-part test established in *Hunt v. Washington State Apple Advertising Commission,* adopted by Indiana courts, an organization has associational standing to seek administrative review of agency action when (1) its members are aggrieved or adversely affected by the agency action; (2) the interests it seeks to protect are germane to its organizational purpose; and (3) individual members' participation is unnecessary. Also, Indiana Trial Rule 56(A) allows a party to cross-move for summary judgment after an opposing party has moved for summary judgment.

Here, HEC cross-moved for summary judgment in response to AESI's summary judgment motion challenging HEC's associational standing, within the deadline for doing so, and designated undisputed evidence establishing all three elements of the *Hunt* test. The trial court set aside the ALJ's ruling that HEC lacked associational standing, but it upheld the ALJ's denial of HEC's Cross-Motion as untimely, leaving HEC without a determination that it has associational standing as a matter of law. Did the trial court err in upholding the ALJ's denial of HEC's cross-motion and in failing to grant summary judgment for HEC on associational standing?

## II. STATEMENT OF THE CASE

This action stems from the March 31, 2023 decision of IDEM to issue a renewed National Pollutant Discharge Elimination System ("NPDES") Permit No. IN0004693 ("NPDES Permit") for Eagle Valley. The Eagle Valley plant is owned and operated by AESI. (App. Vol. VI: 002.) HEC sought administrative review of the NPDES Permit before the former Office of Environmental Adjudication ("OEA"). HEC filed its administrative petition with the OEA on April 17, 2023, and

amended it on July 5, 2023, challenging the NPDES Permit for violating the CWA and the federal Coal Combustion Residuals Rule ("CCR Rule") by:

(1) failing to impose a permit condition requiring AESI to properly dispose of the internal waste stream laden with toxic coal ash constituents generated by Eagle Valley's Reverse Osmosis ("RO") treatment system that treats pumped groundwater used as process water in the plant that is contaminated by Eagle Valley's coal ash waste ponds, instead of allowing that waste stream to be discharged to the White River under the NPDES Permit in violation of the CWA and the CCR Rule ("CCR Discharge Claim");

(2) authorizing a new discharge of mercury to the White River without conducting an antidegradation review in violation of the CWA ("Antidegradation Claim");

(3) imposing mercury effluent limits combined with an inadequate monitoring frequency that cannot assure compliance with the limits or the applicable water quality criterion for mercury in violation of the CWA ("Mercury Claim"); and

(4) failing to evaluate whether concentrations of known carcinogens in Eagle Valley's discharges have a reasonable potential to exceed the water quality criterion for protecting human health from cancer in violation of the CWA ("Cancer-Criteria Claim").

(App. Vol. X: 203-227.)[1]

On July 28, 2023, IDEM and AESI moved to dismiss the CCR Discharge and Antidegradation Claims for failure to state a claim under Indiana Trial Rule 12(B)(6). (App. Vol. X: 176-202.) Thereafter, the Parties briefed the motions. (App. Vol. X: 123-170.) And on October

[1]HEC amended its administrative petition to include additional allegations in support of associational standing but did not otherwise amend its claims against the Permit.

30, 2023, the OEA issued its Findings of Fact, Conclusions of Law, and Non-Final Order granting the motions and dismissing both claims. ("OEA Dismissal Order"). (App. Vol. X: 113-121.)

Thereafter, the Parties engaged in several months of written discovery on the two remaining claims—the Mercury and Cancer-Criteria Claims. (App. Vol. X: 106-108.) On July 1, 2024, the matter was transferred from the OEA to the Office of Administrative Law Proceedings ("OALP"). *See* Ind. Code § 4-15-10.5-12 (2024). The same administrative law judge ("ALJ") before the OEA continued to preside over the proceedings before the OALP. (App. Vol. X: 063.) On August 26, 2024, after the close of discovery, HEC and AESI moved for summary judgment on the two remaining claims. (App. Vol. II: 084-85; Vol. IV: 206-242; Vol. V: 170-89.) AESI also moved for summary judgment on the issue of HEC's associational standing. (App. Vol. IV: 217-223.) IDEM did not join in that part of AESI's motion. (App. Vol. IV: 161-175.)

On October 25, 2024, the Parties responded to each other's summary judgment motions. In particular, AESI and IDEM filed separate response briefs in opposition to HEC's summary judgment motion. (App. Vol. IV: 161-198.) On that same date, HEC responded by filing a consolidated brief in opposition to AESI's summary judgment motion and in support of HEC's cross-motion for summary judgment on the issue of associational standing. (App. Vol. II: 202-40.) On November 7, 2024, AESI objected to HEC's cross-motion arguing it should have been filed on October 25, 2024, the deadline for filing dispositive motions. (App. Vol. II: 183-87, ¶¶ 3-7.) AESI also objected to the length of HEC's consolidated response brief for exceeding, by five pages, the 30-page limit for a single brief. (App. Vol. II:183-87, ¶ 8.) IDEM did not join in AESI's objection. (App. Vol. XII: 093.)

The next day, on November 8, 2024, HEC responded to AESI's objection apologizing for the inadvertent page exceedance and noting that Trial Rule 56(A) allows a party to cross-move in

response to an opponent's motion for summary judgment. (App. Vol. II: 174-180.) On November 13, 2024, the ALJ issued the OALP's Order denying HEC's cross-motion for summary judgment on associational standing as "untimely" and stating it would "not be considered" ("Cross-Motion Denial"). (App. Vol. II: 172-73.)

Three months later, on February 18, 2025, the ALJ issued the OALP's Findings of Fact, Conclusions of Law, and Final Order (the "OALP's Final Order"), which granted AESI's motion for summary judgment in all respects. (App. Vol. II: 092-105.) The OALP's Final Order also made final the OEA's earlier Dismissal Order, and the OALP's Cross-Motion Denial (collectively the "OALP's Final Ruling"). (App. Vol. II: 092-105.)

On March 20, 2025, HEC filed its Verified Petition for Judicial Review in Morgan County Superior Court asking the court to set aside the OALP's Final Ruling. (App. Vol. II: 019-077.) HEC filed its Opening Brief on July 21, 2025. (App. Vol. XII 002-071.) AESI and IDEM filed their respective response briefs on October 3, 2025. (App. Vol. XII: 086-179.) And HEC filed a consolidated reply to both response briefs on November 10, 2025. (App. Vol. XII: 180-235.) On August 10, 2026, the trial court issued its Order on Verified Petition for Judicial Review ("Trial Court's Order") upholding the OALP's Final Ruling in all respects except the ALJ's determination that HEC lacked associational standing. (App. Vol. II: 011-018.) The trial court set aside that ruling finding it "somewhat arbitrary" and "disingenuous." (App. Vol. II: 015-16, ¶¶ 51, 53.)

HEC now appeals, seeking reversal of the Trial Court's Order insofar as it upheld the OEA's Dismissal of HEC's CCR Discharge and Antidegradation Claims and the OALP's grant of summary judgment for AESI and IDEM on HEC's Mercury and Cancer-Criteria Claims. HEC asks this Court to set aside those dismissals and direct entry of summary judgment in HEC's favor on the Mercury and Cancer-Criteria Claims. HEC does not appeal the trial court's decision to set aside

the ALJ's ruling on associational standing. However, HEC respectfully asks this Court to affirm that ruling on proper legal grounds, reverse the denial of HEC's Cross-Motion, and grant summary judgment for HEC on associational standing.

## III. STATEMENT OF FACTS[2]

Eagle Valley operated as a coal-fired power plant on the banks of the West Fork of the White River from 1949 until 2016, generating millions of tons of coal combustion waste, commonly known as coal ash or coal combustion residuals ("CCR"). (App. Vol. VI: 154-58.) AESI retired the coal-fired plant in 2016 and replaced it with a natural-gas facility in 2018. (App. Vol. VI: 071.) But nearly seventy years of coal-fired generation left behind massive quantities of coal ash that had been mixed with water and deposited in large, unlined waste ponds around the facility next to the White River. (App. Vol. VI: 154–58.)

Coal ash, which is the by-product of burning coal, contains dangerous carcinogens, neurotoxins, and poisons, including, among others, arsenic, boron, cadmium, hexavalent chromium, lead, lithium, mercury, molybdenum, selenium, and thallium. (App. Vol. XI: 181-82.) In 2015, EPA promulgated federal regulations governing the disposal of coal ash including requirements for addressing releases from existing coal-ash impoundments and their closure. 40 C.F.R. Part 257, Subpart D (the "CCR Rule").[3]

The coal ash ponds at Eagle Valley span more than fifty acres west of the power plant and contain at least 830 acre-feet of coal ash. (App. Vol. VI: 169, 191; Vol. VII: 065, 241.) These

[2] Some of the facts recited here are drawn from HEC's administrative petition, which the ALJ was required to accept as true for purposes of AESI and IDEM's motions to dismiss under Trial Rule 12(B)(6). Because the ALJ dismissed HEC's CCR Discharge and Antidegradation claims at the pleading stage, HEC had no opportunity to develop an evidentiary record supporting those claims. However, HEC's administrative petition does cite public records and other publicly available documents in support of its factual allegations.

[3] HEC includes this regulatory background not as legal argument but to provide the relevant context in which IDEM issued the NPDES Permit for Eagle Valley.

unlined ponds sit within floodplain of the White River 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. (Appellant's App. Vol. IX: 020-50, 151.) Due to decades of contaminants leaching from these ash ponds into the uppermost aquifer, and in some places coming in direct contact with the aquifer, contamination of groundwater remains ongoing. (App. Vol. IX: 029-30, 049-50; Vol. XII: 081, 090-91.) Eagle Valley's annual groundwater monitoring reports consistently confirm elevated levels of coal ash contaminants including arsenic, lithium, and molybdenum above groundwater protection standards, and that contaminated plume has migrated off-site. (App. Vol. XI: 027; 186-87.)

Because of this groundwater contamination, the CCR Rule required AESI to take corrective measures to "reduce or eliminate, to the maximum extent feasible," further releases of coal ash contaminants into the environment. (App. Vol. XI: 028; Vol XII: 150); *see also* 40 C.F.R. §§ 257.90(d), 257.97(b). The Rule also required AESI to close its leaching coal-ash ponds either by removing the waste or closing the ponds in place "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." (App. Vol. XI: 028; Vol. XII: 150); *see also* 40 C.F.R. §§ 257.101(a)(1), 257.102(c), (d). AESI chose closure in place, leaving the coal ash sitting in the White River floodplain in perpetuity. (App. Vol. X: 206, ¶ 7.)

To control the migration of contaminated groundwater toward the River, AESI relies on high-capacity production wells that continuously pump the groundwater for use in Eagle Valley's operations. (App. Vol. XII: 090-91, 129-30.) AESI maintains that these wells have reversed the groundwater flow away from the White River and thereby "capture" and "contain" the coal ash

contaminants from reaching the River. (App. Vol. X: 206-07, ¶¶ 9-10.) HEC's concern is that the coal ash contaminants in the groundwater captured by those wells do not remain contained. (App. Vol. V: 011; Vol. X: 207-08 ¶¶ 10-12; Vol. XII: 129-30.)

IDEM's Fact Sheet for the NPDES Permit confirms the pumped groundwater is "the source water for all processes at [Eagle Valley]" and contains coal ash pollutants 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. (App. Vol. VI: 080-81, 083-84.) However, once the groundwater enters the plant, the coal-ash contaminants it contains are ultimately discharged to the White River. (App. Vol. VI: 073-74.) The CCR Rule provides that such discharges "must be handled in accordance with the surface water requirements of the [CWA]." (App. Vol. XII: 097-98, 149); *see also* 40 C.F.R. § 257.82(b) (incorporating 40 C.F.R. § 257.3-3(a)).

In turn, the CWA regulates such wastewater discharges through two distinct types of effluent limitations: technology-based effluent limitations ("TBELs"), which are based on the pollution control achievable through available treatment technologies, and water-quality-based effluent limitations ("WQBELs"), which are imposed when necessary to ensure compliance with applicable water quality standards. As IDEM's Fact Sheet explains, TBELs, unlike WQBELs, are imposed regardless of the receiving water quality. (App. Vol. VI: 076-77); *see also* 40 C.F.R. § 122.44(a), (d); 40 C.F.R. § 125.3.

IDEM's Fact Sheet also confirms that the EPA has established industry-wide technology-based effluent limitations guidelines ("ELGs") for steam-electric generating facilities like Eagle Valley based on two levels of pollution control: "best practicable control technology" ("BPT") and the more stringent "best available technology" ("BAT"). (App. Vol. XI: 118.) Where those

industry-wide guidelines do not cover particular pollutants or aspects of a facility's operations, the permitting agency must establish case-specific TBELs using its "best professional judgment" ("BPJ"). (App. Vol. VI: 076-77); *see also* 40 C.F.R. § 125.3(c)(3). IDEM did that here. IDEM's Fact Sheet confirms the agency exercised BPJ to establish case-specific TBELs for Eagle Valley's combined wastewater discharge, consisting of three internal waste streams. (App. Vol. VI: 076-78.) In doing so, IDEM applied the less stringent BPT-based limits to certain conventional pollutants but imposed no TBELs on the toxic coal-ash pollutants[4] in Eagle Valley's discharge. (App. Vol. VI: 076-84.)

This is so, even though the power plant has a reverse osmosis ("RO") water treatment system that is already being used to remove the coal ash contaminants from the groundwater before it is used as process water in the plant. (App. Vol. V: 011; Vol. VI: 073-74.) But instead of requiring AESI to separately dispose of the coal-ash-laden waste stream generated by the RO system, the NPDES Permit allows AESI to mix that waste stream back into the spent process water, which is combined with the other waste streams and ultimately discharged to the White River without further treatment. (App Vol. V: 011; Vol. VI: 073-74; Vol. X: 207; Vol. XII: 130.)

Separate from the technology-based requirements, the CWA also required IDEM to determine whether water quality based effluent limits ("WQBELs") were necessary through a process known as a "reasonable potential to exceed" ("RPE") analysis. *See* 40 C.F.R. § 122.44(d)(1). The purpose of the analysis is to determine whether pollutants in a facility's

[4] "Conventional pollutants" are defined by the CWA to include biochemical oxygen demand (BOD5), total suspended solids (TSS), fecal coliform, pH, and any other pollutants EPA defines as conventional. 33 U.S.C. § 1314(a)(4). EPA added "oil and grease" as a conventional pollutant. 40 C.F.R. § 401.16. On the other hand, EPA has identified 65 pollutants and classes of pollutants as "toxic pollutants." 40 C.F.R. § 401.15. Those include antimony, arsenic, barium, cadmium, cobalt, lead, lithium, molybdenum, thallium, and selenium, which are also CCR contaminants that IDEM identified in Eagle Valley's discharges to the White River. (App. Vol. VI: 134.)

discharge have the reasonable potential to cause or contribute to an exceedance of applicable water quality criteria ("WQC") and, if so, the permit must include WQBELs sufficient to assure the criteria are met. (App. Vol. VI: 079); *see also* 40 C.F.R. § 122.44(d)(1).

As part of its RPE analysis, IDEM identified four coal ash contaminants in Eagle Valley's discharges—arsenic, beryllium, cadmium, and lead—as "probable or known human carcinogens." (App. Vol. VI: 134; Vol IX: 232-33.) IDEM evaluated the concentrations of these carcinogens to determine whether they had a reasonable potential to exceed Indiana's numeric water quality criteria for protection of aquatic life and determined they did not. (App. Vol. VI: 134.) But Indiana also has a narrative WQC to protect human health from an unacceptable risk of cancer. *See* 327 IAC § 2-1-6(a)(2)(A)(iv). Nevertheless, IDEM did not evaluate whether the concentrations of the four carcinogens in Eagle Valley's discharges have a reasonable potential to exceed that WQC, because it is expressed in narrative rather than numeric form. (App. Vol. V: 233-34; Vol. VI: 127.) As a result, IDEM never determined whether Eagle Valley's discharges of these carcinogens require WQBELs to protect human health from cancer risk.

IDEM did find that Eagle Valley's discharges of mercury have a reasonable potential to exceed the numeric chronic aquatic criterion (4-day average) of 12 ng/l (nanograms per liter). (App. Vol. VI: 081, 091, 117, 127-28.) IDEM confirmed that since mercury is a bioaccumulative chemical of concern ("BCC"), this WQC must "be applied directly to [Eagle Valley's] undiluted discharge for all discharges." (App. Vol. VI: 127-28.) Accordingly, IDEM set a monthly average limit—defined as "the highest allowable monthly discharge for any calendar month"—consistent with the WQC of 12 ng/l. (App. Vol. VI: 006-07, 017-18, 081, 091.) IDEM also included a maximum daily limit—defined as "the maximum daily discharge for any calendar day"—above the WQC of 20 ng/l. (App. Vol. VI: 006-07, 018, 081, 091.)

As for monitoring AESI's compliance with these mercury limits, the NPDES Permit requires AESI to take a single grab sample once every other month, even though Eagle Valley discharges around 1.3 million gallons of wastewater per day, year-round to the White River. (App. Vol. VI: 007, 011, 091.) IDEM admitted in discovery that under this monitoring regime, the single required grab sample taken in a particular month serves as both the daily value for that day and the monthly average for that month. (App. Vol. IX: 235, ¶ 21.) Accordingly, IDEM acknowledged that a sample measuring 20 ng/l would comply with the daily maximum limit while violating the monthly average limit of 12 ng/l and the WQC for mercury. (App. Vol. V: 236.)

These new mercury limits also raised a separate permitting issue under Indiana's antidegradation requirements, which are intended to prevent new or increased pollution from unnecessarily degrading water quality. (App. Vol. VI: 085; Vol. X: 044-46.) Among other things, a permittee's deliberate activity resulting in a new or increased discharge of a regulated pollutant—or a new or increased permit limit—requires the permittee to satisfy Indiana's antidegradation procedures. (App. Vol. VI: 085); *see also* 32 IAC § 2-1.3-1. During Eagle Valley's transition from coal to natural gas, IDEM determined in a 2015 permitting decision that effluent limits for mercury and antidegradation review were not necessary based on AESI's "estimates" and "projections" that pollutant loadings of mercury would decrease following the conversion to natural gas. (App. Vol. VI: 085.)

In renewing the 2023 NPDES Permit at issue here, IDEM again considered antidegradation because the Permit contains "new effluent limitations for mercury." (App. Vol. VI: 085.) IDEM linked the need for these new mercury limits to the switch from coal to natural gas and actual discharge data from the natural gas plant showing AESI's earlier estimates and projections were wrong. (App. Vol. VI: 085.) Yet, IDEM declined to require antidegradation review because it

concluded that "the new effluent limitations are not the result of a deliberate activity taken by the permittee." (App. Vol. VI: 085.)

Eagle Valley's discharges to the White River are particularly concerning for people who live in the City of Martinsville, including three members of HEC. (App. Vol. X: 228-38.) The City's municipal wells that supply public drinking water are in the White River floodplain downstream of Eagle Valley. (App. Vol. X: 230-31 ¶ 14, 234 ¶ 16.) And while the City's water utility tests and treats the water for many pollutants, it does not test or treat for many of the coal ash contaminants discharged from Eagle Valley. (App. Vol. V: 168-69.) According to the sworn affidavits of Mark Hutson, a hydrogeologist, as well as Dr. Indra Frank, a physician with expertise in toxicology and public health, these ongoing discharges threaten the safety of the City's drinking water and pose serious health risks to people who rely on that water. (App. Vol. X: 239-48.) In addition, heavy metals in Eagle Valley's discharges can accumulate in river-bottom sediments at concentrations far exceeding those detected in water samples. (App. Vol. X: 241, ¶ 12.) And during high-flow events, those contaminated sediments can be mobilized and deposited along downstream floodplain areas where HEC members recreate, creating another potential exposure pathway. (App. Vol. X: 234 ¶¶ 11-14; 241, ¶ 13; 247, ¶ 16.)

It is against this backdrop that HEC sought administrative review on behalf of its members who live in Martinsville, challenging the March 2023 renewal of Eagle Valley's NPDES Permit. (App. Vol. X: 203-27.) That challenge gave rise to the administrative rulings and trial court judgment now before this Court.

## IV. SUMMARY OF ARGUMENT

HEC's challenge to Eagle Valley's NPDES Permit was never adjudicated under the governing procedural standards and controlling law. The ALJ dismissed two of HEC's claims before HEC could develop an evidentiary record. She subsequently granted summary judgment

for AESI and IDEM on the remaining two claims despite the undisputed designated evidence, including IDEM's own sworn admissions, and controlling CWA requirements warranting summary judgment for HEC. Rather than correct these errors, the trial court upheld all four rulings without independently examining HEC's pleading allegations, the designated evidence, or the governing law. As a result, HEC has yet to receive a fair and independent determination on the merits of its claims.

The underlying stakes are substantial. Although Eagle Valley stopped burning coal in 2016, its decades of coal-fired operations left behind massive quantities of toxic coal ash sitting in unlined waste ponds along the White River. The NPDES Permit IDEM issued allows the contaminants from those ponds to be discharged *without limit* into the River, notwithstanding an existing treatment system that removes those pollutants from the plant's intake water. The Permit also authorizes new mercury limits without antidegradation review, imposes monitoring requirements that cannot assure compliance with the water quality criterion for mercury, and allows known carcinogens to be discharged without evaluating their potential to exceed Indiana's existing criterion for protecting human health from cancer. These are the deficiencies HEC challenged on behalf of its members who live downstream of Eagle Valley in Martinsville.

Nevertheless, contrary to Trial Rule 12(B)(6), the ALJ erroneously dismissed HEC's CCR Discharge and Antidegradation Claims by misconstruing HEC's pleading allegations and disregarding the governing law. She recast the CCR Discharge Claim, which challenges the Permit's authorization of toxic coal ash discharges, as an improper collateral attack on AESI's compliance with the CCR Rule, then rejected the additional CWA authorities HEC presented in support of that claim as improperly raised "new" claims. In turn, the ALJ dismissed HEC's Antidegradation Claim as time-barred because HEC had not appealed IDEM's separate permitting

decision made eight years earlier. Neither dismissal can be reconciled with the CWA, Indiana's notice-pleading standard, or Trial Rule 12(B)(6).

The ALJ's grant of summary judgment for AESI and IDEM on the Mercury Claim and Cancer-Criteria Claim was equally erroneous. On the Mercury Claim, the ALJ disregarded IDEM's sworn admission that the Permit's monitoring frequency allows a single sample to satisfy the daily maximum limit while violating the monthly average limit in violation of the CWA and EPA guidance. On the Cancer-Criteria Claim, the ALJ upheld IDEM's admitted failure to evaluate known carcinogens against Indiana's human-health cancer criterion because it is expressed in narrative, rather than numeric form, despite the plain language of the CWA, which requires consideration of narrative and numeric water-quality criteria. Thus, in both instances, the undisputed evidence and governing law warranted summary judgment for HEC, not AESI and IDEM.

The trial court failed to correct these errors. Despite AOPA's mandate that a reviewing court must provide independent, non-deferential judicial review of agency actions, the trial court upheld the ALJ's dispositive rulings without identifying or engaging with the material evidence, without mentioning, much less addressing the controlling CWA requirements, or providing any explanation as to why the ALJ's rulings satisfy applicable standards under AOPA, Trial Rule 12(B)(6), and Trial Rule 56. The trial court's findings are so inadequate as to prevent intelligent appellate review contrary to AOPA and Trial Rule 52(A).

Finally, although the trial court correctly set aside the ALJ's adverse summary judgment ruling for AESI on associational standing, it did so without applying the governing *Hunt* test. It also upheld the ALJ's procedural denial of HEC's cross-motion for summary judgment on the issue, contrary to Trial Rule 56(A), leaving HEC's entitlement to summary judgment on standing

unresolved. Because the undisputed, designated evidence establishes that HEC has associational standing as a matter of law, this Court should grant summary judgment for HEC on that issue.

Taken together these errors have effectively thwarted HEC's right to obtain meaningful review of IDEM's decision to issue a Permit that violates fundamental CWA protections against toxic water pollution. This Court should reverse the trial court's erroneous judgment upholding the dismissal of HEC's CCR Discharge and Antidegradation Claims and set aside those dismissals. The Court should also reverse the trial court and set aside the ALJ's erroneous summary judgment rulings on HEC's Mercury and Cancer-Criteria Claims, and grant summary judgment for HEC on those claims. Finally, the Court should affirm, on proper legal grounds, the trial court's correct decision to set aside of the ALJ's adverse ruling on associational standing, reverse the trial court's decision to uphold the ALJ's denial of HEC's Cross-Motion on that issue, and grant summary judgment for HEC on associational standing.

## V. ARGUMENT

### A. Standard of Review

The Administrative Orders and Procedures Act ("AOPA") governed the administrative proceedings before the OEA and OALP below, as well as the trial court's judicial review of those proceedings. *See* Ind. Code § 4-21.5 *et seq.* On appeal, this Court stands in the same position as the trial court and applies the same AOPA standard that governed the trial court's review. *Filter Specialists, Inc. v. Brooks*, 906 N.E.2d 835, 844 (Ind. 2009).

AOPA has undergone significant changes in recent years. In 2024, the Indiana General Assembly amended the statute to, among other things, eliminate the required deference that courts had long been required to afford agency decisions. Public L. No. 128-2024, §12 (adding Ind. Code § 4-21.5-5-11, effective July 1, 2024). This reform restored the judiciary's traditional, independent

role in reviewing agency determinations and removed any presumption of correctness previously afforded to administrative decisions. *See Ind. Off. of Util. Consumer Couns. v. Duke Energy Ind., LLC*, 248 N.E.3d 1205, 1210-12 (Ind. 2024) (explaining a reviewing court asks not whether an agency's interpretation of a statute "was reasonable but whether it was right.").

Stated differently, AOPA no longer prohibits a reviewing court from "try[ing] the cause *de novo* or substitut[ing] its judgment for that of the agency." Public L. No. 128-2024, §12 (eliminating that statutory prohibition). Instead, the reviewing court "shall decide all questions of law…*without deference* to any previous interpretation made by the agency" and "is not bound by a finding of fact made by the ultimate authority [of the agency] if the finding . . . is not supported by the record." I.C. § 4-21.5-5-11(emphasis added). Also changed by the amendments to AOPA is the required evidentiary burden for an agency's findings of fact. Those findings must now be supported by a "preponderance of the evidence" not merely "substantial evidence" as before. Ind. Code § 4-21.5-5-14(d)(5).[5]

Thus, while judicial review remains confined to the agency record, courts must independently determine, based on the record as a whole, and without deference to the agency's factual findings or legal conclusions, whether the agency action 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

[5] *See Ind. High Sch. Athletic Ass'n, Inc. v. Watson,* 938 N.E.2d 672, 680–81 (Ind. 2010) (observing that "substantial evidence" is "more than a scintilla" but "need not reach the level of preponderance"); *M.Y. v. State Dep't of Child Servs. (In re K.Y.),* 145 N.E.3d 854, 859 (Ind. Ct. App. 2020) (a "preponderance of the evidence" is "the greater weight of the evidence.") (quotation omitted).

by a preponderance of the evidence." Ind. Code § 4-21.5-5-14(d). If the agency action fails any of these grounds, the reviewing court must set the action aside. I.C. § 4-21.5-5-15.

The ALJ's dispositive rulings fail this standard in multiple respects, yet the trial court largely upheld them. As discussed next, the trial court compounded its error by failing to make the specific findings necessary to facilitate intelligent appellate review in violation of AOPA and Trial Rule 52(A).

**B. The Trial Court's Findings Are Insufficient to Permit Intelligent Appellate Review.**

AOPA mandates that a court on judicial review of agency action "*shall* make findings of fact on each material issue on which the court's decision is based." Ind. Code § 4-21.5-5-14(c) (emphasis added). In turn, Indiana Trial Rule 52(A) requires the trial court to make those findings *specially. See* Ind. Trial Rule 52(A)(2) (directing a court on review of an administrative agency's action to "find the facts *specially* and state its conclusions thereon" and "*shall* make [those] special findings of fact without request." *Id.* (emphasis added). A trial court's failure to do so is reversible error. *Scott Cnty. Sch. Dist. v. Dietrich*, 496 N.E.2d 91, 92 (Ind. Ct. App. 1986).

The purpose of this requirement is to "provide both the parties and the reviewing court with the theory or theories upon which the lower court relied, thus facilitating appellate review." *Ind. Dep't of Corr. v. Ind. Civ. Rts. Comm'n*, 486 N.E.2d 612, 615 (Ind. Ct. App. 1985). Stated differently, a trial court's special findings "facilitate judicial review by enabling [the appellate] court to more readily understand the . . . [trial] court's view of the controversy" without having to speculate as to the court's reasoning. *Scott Cnty. Sch. Dist.*, 496 N.E.2d at 92 (quoting *Farmers State Bank, LaGrange v. Dep't of Fin. Insts.*, 355 N.E.2d 277 (Ind. Ct. App. 1976)).

"[W]hether the [trial court's] findings are adequate depends on whether they are sufficient to disclose a valid basis under the issues for the legal result reached." *Ind. Dep't of Corr.,* 486

N.E.2d at 615. For instance, when an appellate court "cannot discern whether the trial court applied the correct legal standard," the trial court's findings are inadequate. *Young v. Young*, 81 N.E.3d 250, 256 (Ind. Ct. App. 2017). Similarly, a trial court's findings are inadequate if they are "ambiguous" and do not contain all the facts necessary to support the court's legal conclusions or state "the ultimate facts from which the trial court determines the legal rights of the parties to the action." *Seslar v. Seslar*, 569 N.E.2d 380, 383 (Ind. Ct. App. 1991). That is the situation here.

Here, the trial Court's Order does not come close to meeting these requirements. The first thirty numbered paragraphs merely recount the Parties' filings and procedural history, the applicable AOPA standard, and what the ALJ ultimately decided in issuing the three administrative rulings under review. (App. Vol. II: 011-13, ¶¶ 1-30.) So, while these paragraphs describe *what* occurred below, they provide none of the material findings necessary to understand *why* the trial court ultimately concluded that the ALJ's rulings satisfy AOPA's standard of review.

The remaining paragraphs are similarly deficient. When the Trial Court's Order turns to the merits, it largely announces ultimate legal conclusions rather than making specific findings that explain them. For instance, in upholding the ALJ's Rule 12(B)(6) dismissal of HEC's CCR Discharge and Antidegradation claims, the trial court declared that the "law and arguments relied upon by the ALJ" are not "arbitrary or capricious or an abuse of discretion," that the ALJ's "decisions [on these two claims] are not contrary to any constitutional right nor in excess of [of the ALJ's] authority," that her "considerations [are] support[ed] by the necessary proof" and establish that "both claims fail to state any set of circumstances under which they would be entitled to relief." (App. Vol. II: 014, ¶¶ 35-36, 39.)

But nowhere in the Trial Court's Order does it make substantive findings to support these ultimate conclusions. Indeed, despite the governing 12(B)(6) standard, which required the trial court to take HEC's pleading allegations as true and construe them in HEC's favor, the court never engaged with HEC's pleading allegations *at all*. For that matter, the Trial Court's Order does not explain why the detailed pleading allegations HEC has consistently pointed to as the basis of its CCR Discharge Claim fail to state a claim under the governing law. *Infra* at 29-32. And as for the governing law, the CWA is not even mentioned in the Trial Court's Order, much less is there a reasoned discussion of the NPDES permitting requirements and other legal authorities HEC presented in support of that claim. *Infra* at 37-42.

The trial court's treatment of HEC's cross-motion for summary judgment on associational standing is similarly conclusory. The court declared the ALJ had the "necessary level of proof" to strike the cross-motion because the ALJ "set deadlines" and those "deadlines were not followed." (Vol. II: 015, ¶ 48.) But the trial court never identified the deadline or explained *how* HEC failed to meet it. More importantly, the court never addressed the controlling legal question HEC presented: whether Trial Rule 56(A) allowed HEC to *respond* to an issue that AESI raised for the first time in its summary judgment motion by cross-moving on that issue by the deadline for *responding*. (App. Vol. XII: 50-54.) Instead, the trial court summarily declared that "a proper remedy is always to strike a filing when [deadlines] are not met." (App. Vol. II: 015, ¶ 48.)

The inadequacy of trial court's findings is even more pronounced in its review of the ALJ's grant of summary judgment for IDEM and AESI on HEC's Mercury and Cancer-Criteria claims. HEC designated undisputed evidence supporting both claims, including IDEM's own sworn admissions in discovery and technical documents. *Infra* at 45-60. Yet the Trial Court's Order identifies none of that evidence. Instead, it characterizes the ALJ's "discussion of the Mercury

Claim" as "thorough," states that HEC made unsupported "broad stroke allegations of problems," and then concludes that since the "ALJ utilized the dictates of Ind. Tr. R. 56(c) to determine there was 'no genuine issue of any material fact' as to the mercury and [cancer criteria] claims . . . it would *seem* the finding was appropriate." (App. Vol. II: 017, ¶¶ 62, 64, 66 (emphasis added).) The Trial Court's Order never identifies what evidence the court accepted or rejected, what material facts it found undisputed and established by a preponderance of the evidence, or how those facts support summary judgment for IDEM and AESI.

The trial court's final declaration that "[a]ll findings that were upheld or set aside were done so by a preponderance of the evidence" does not solve this problem. (App. Vol. II: 018, ¶ 71.) Merely declaring that the preponderance standard was applied is not a finding of fact, much less does it provide the specific findings "on each material issue" required by AOPA and Trial Rule 52(A). Without identifying the material facts or the evidence supporting them, neither the Parties nor this Court can determine how the trial court applied the evidentiary standard or why it reached the conclusions it did. This is precisely the problem special findings are intended to prevent.

This Court should not have to reconstruct the administrative record, speculate about what evidence the trial court credited, or infer the legal reasoning that connects that evidence to the court's conclusions. *See Scott Cnty. Sch. Dist.*, 496 N.E.2d at 92. Because the Trial Court's Order requires this Court to do just that, the Order is insufficient to permit intelligent appellate review. This Court should reverse the trial court for that reason alone. But as detailed below, the problem is not merely one of explanation—it is one of substance. The trial court erred in upholding the ALJ's dismissal of HEC's CCR Discharge and Antidegradation Claims under Trial Rule 12(B)(6). It also erred in failing to recognize that the undisputed evidence and governing law warranted

summary judgment under Trial Rule 56(C) for HEC, not AESI and IDEM, on the Mercury and Cancer-Criteria Claims.

### C. The ALJ's Premature Dismissal of HEC's CCR Discharge and Antidegradation Claims is Contrary to Trial Rule 12(B)(6) and Should Have Been Set Aside.

The standard of review for a motion to dismiss under Indiana Trial Rule 12(B)(6) is well known. Such a motion "tests the legal sufficiency of the complaint: that is, whether the allegations in the complaint establish *any* set of circumstances under which a plaintiff would be entitled to relief." *Anonymous Physician 1 v. White*, 153 N.E.3d 272, 277 (Ind. Ct. App. 2020) (quoting *Trail v. Boys and Girls Clubs of Nw. Ind.*, 845 N.E.2d 130, 134 (Ind. 2006) (emphasis in original)). A motion to dismiss under 12(B)(6) does not "test the sufficiency of the facts alleged with regards to their adequacy to provide recovery" but "whether they have stated some factual scenario in which a legally actionable injury has occurred." *Id.* Thus, when reviewing a 12(B)(6) motion, the court "accept[s] the facts alleged in the complaint as true and view[s] the pleadings in a light most favorable to the nonmoving party and with every reasonable inference in the nonmoving party's favor." *Id.*

Under this standard, "[t]he court may only look to the complaint, and well-pleaded material must be taken as admitted." *McQueen v. Fayette Cnty. Sch. Corp.*, 711 N.E.2d 62, 65 (Ind. Ct. App. 1999) (citing *Hanover Logansport, Inc. v. Robert C. Anderson, Inc.*, 512 N.E.2d 465, 468 (Ind. Ct. App. 1987)). "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.* (citing *Runde v. Vigus Realty, Inc.*, 617 N.E.2d 572, 575 (Ind. Ct. App.1993)). If a complaint survives this "limited scrutiny," it states a claim for relief "even if there may lurk on the horizon an unassailable defense" because the plaintiff "need not anticipate [it] . . . and plead matters in avoidance in the complaint." *Bellwether Props., LLC v. Duke Energy Ind., Inc.,* 87 N.E.3d 462, 464, 466-67 (Ind. 2017).

In addition, Trial Rule 12(B)(6) motions are viewed "with disfavor because [they] undermine the policy of deciding causes of action on their merits." *Anonymous Physician 1,* 153 N.E.3d at 277 (quoting *McQueen*, 711 N.E.2d at 65). Accordingly, such dismissals are "rarely appropriate" and warranted only when "it appears *to a certainty* on the face of the complaint that the complaining party is not entitled to any relief." *Id.* (citations omitted) (emphasis in original).

The ALJ failed to follow this established standard in dismissing HEC's CCR Discharge and Antidegradation Claims. Indeed, the ALJ ignored most of HEC's pleading allegations, misstated others, and overall construed HEC's administrative petition *against* HEC. For its part, the trial court upheld the dismissal without engaging with HEC's pleading allegations *at all.* As detailed below, the ALJ's misapplication of Trial Rule 12(B)(6), which the trial court failed to correct, is evident in three respects: (1) she dismissed the CCR Discharge Claim by recasting it as a claim HEC never made; (2) she treated the additional legal authority HEC presented in opposition to AESI and IDEM's motions to dismiss the CCR Discharge Claim as improperly raising two "new claims" that the trial court then refused to review; and (3) she dismissed the Antidegradation Claim based on what amounts to an affirmative time-bar defense that has no foundation in the law. Accordingly, this Court should reverse the trial court and set aside the ALJ's erroneous dismissal.

1. <u>The ALJ Erroneously Dismissed HEC's CCR Discharge Claim by Recasting it as a Claim HEC Never Made.</u>

A fundamental error underlying the ALJ's premature dismissal of HEC's CCR Discharge Claim is straightforward: she dismissed a claim HEC did not make. Adopting AESI and IDEM's characterization of the claim, the ALJ agreed it amounted to a "collateral attack on AES' compliance with the CCR Rule," for which the appeal of Eagle Valley's NPDES Permit was not "the proper forum." (App. Vol. X: 116-17, ¶¶ 7-8.) In doing so, the ALJ characterized HEC's claim as one that: "contends AES' use of groundwater for its facility processes does not comply with the

CCR Rule"; does not allege "the NPDES Permit fails to satisfy the requirements of any applicable NPDES law"; fails to "identify the NPDES permit terms and conditions" that would "satisfy the requirements of the law governing such permits"; and "fails to state a claim that can be remedied through the appeal of the NPDES Permit." (App. Vol. X: 116-17, ¶¶ 8-9.) Those characterizations cannot be reconciled with HEC's pleading allegations, which the ALJ was required to accept as true and construe in HEC's favor.

Indeed, the factual grounds for HEC's CCR Discharge Claim are not based on AESI's *use* of CCR contaminated groundwater for Eagle Valley's processes as the ALJ erroneously found. Paragraphs 12 and 57 of HEC's administrative petition plainly state the factual basis of the claim; that is, IDEM's failure to impose a NPDES Permit condition that requires 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 that 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.

(App. Vol. X: 208, 219, ¶¶ 12, 57 (emphasis added).) These are the operative facts the ALJ was required to accept as true and construe in HEC's favor. *See Anonymous Physician 1*, 153 N.E.3d at 277. Yet the ALJ disregarded them and dismissed HEC's CCR Discharge Claim based on a factual premise HEC never alleged.

Also contrary to the ALJ's characterizations, HEC's administrative petition identifies both the NPDES Permit term HEC seeks and the NPDES law that authorizes it. Indeed, paragraph 57 unambiguously identifies the "NPDES Permit term" the ALJ said was missing:

> 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.

(App. Vol. X: 219, ¶ 57 (emphasis added).) And paragraph 56 identifies the applicable "NPDES law" the ALJ said HEC failed to invoke:

> 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).

(App. Vol. X: 218-19, ¶ 56.)

While these allegations are not fully developed and do not set forth *every* legal basis supporting HEC's claim,[6] Trial Rule 12(B)(6) did not require them to. They plainly allege that the NPDES Permit violates the CWA by allowing AESI to discharge coal ash contaminants to the

[6] This is not surprising. AOPA gives a petitioner 15 days after notice of an agency's decision to petition for administrative review. Ind. Code § 4-21.5-3-7(a)(3). In a technically complex permitting matter such as this, that abbreviated period underscores why an administrative petition serves a notice-pleading function and cannot reasonably be expected to contain the fully developed legal arguments and authorities that emerge through subsequent discovery and briefing.

White River when there is a water treatment technology already in use that could prevent that outcome. These allegations also identify the NPDES permit condition HEC contends IDEM should have imposed—namely, proper disposal of the RO waste stream. And they identify *some* of the CWA authorities that authorize IDEM to impose that requirement. Taken as true, these allegations are more than sufficient to state a colorable claim for relief under the CWA.

The fact that HEC also alleged that this same conduct violates the CCR Rule does not transform this NPDES permit challenge into a collateral attack on AESI's compliance with the CCR Rule. That Rule enters the case because AESI tied its compliance with the CCR Rule to its NPDES Permit. As HEC alleged—and the ALJ was required to accept as true—AESI's corrective measures plan for preventing the migration of coal ash contaminated groundwater from reaching the White River as required by the CCR Rule relies on Eagle Valley's high-capacity production wells to "capture" the groundwater before it reaches the River, and for the NPDES Permit to ensure the contaminants are "contained." (App. Vol. X: 206-208, ¶¶ 9-12.) In other words, AESI made the NPDES Permit the mechanism for satisfying its CCR Rule obligations; HEC did not.

The relationship between the CCR Rule and the NPDES Permit IDEM issued for Eagle Valley is also built into the governing law. As IDEM acknowledged, the CCR Rule requires that "discharges from a CCR unit must be handled in accordance with the surface water requirements of the CWA." (App. Vol. XII: 102; Vol. X: 182 (quoting 40 C.F.R. § 257.82(b))); *see also* 40 C.F.R. § 257.3-3(a). According to IDEM, "[b]y obtaining its NPDES Permit, AESI has complied with 40 C.F.R. § 257.82(b) [of the CCR Rule], as the Permit authorizes its discharge into the White River pursuant to the CWA and its implementing regulations." (App. Vol. XII: 98.) Plainly, IDEM understands the link between the NPDES Permit for Eagle Valley and AESI's compliance with the CCR Rule. So does AESI. (App. Vol. XII: 090, 098, 149 (likewise confirming that "the CCR

Rule . . . requires that 'discharge from the CCR unit must be handled in accordance with the surface water requirements under §257.3-3,' which in turn refers to *NPDES permitting of those discharges*." (emphasis added)) Thus if the NPDES permitting of those coal ash discharges violates the CWA, as HEC contends, then the CCR Rule is violated as well. (App. Vol. X: 217.)

In sum, the CCR Discharge Claim is not a "collateral attack" on AESI's compliance with the CCR Rule—it is a straightforward CWA challenge to Eagle Valley's NPDES Permit that has implications for AESI's compliance with the CCR Rule. While the CCR Rule and CWA have distinct regulatory roles, they nevertheless intersect by design. The ALJ's dismissal of HEC's CCR Discharge Claim ignores that relationship and cannot be reconciled with HEC's pleading allegations or the mandates of Trial Rule 12(B)(6).

2. <u>The ALJ Improperly Treated the Additional Legal Authorities HEC Presented in Support of the CCR Discharge Claim as Raising "New" Claims that the Trial Court Then Refused to Review.</u>

The ALJ compounded her error by treating the additional legal argument HEC presented in opposition to AESI and IDEM's motions to dismiss the CCR Discharge Claim as "new claims." Specifically, the ALJ concluded that HEC improperly raised two new claims "related to technology-based effluent limitations [TBELs] and IDEM's application of best professional judgment [BPJ]" because those arguments were not enumerated in HEC's administrative petition. (App. Vol. X: 118.) The trial court accepted that characterization outright, referring to the so-called "new claims" as "deficiencies 3 and 4" that "were improperly pled and should never have been considered." (App. Vol. II: 013-14, ¶¶ 31–34.) Remarkably, the court went further, stating that "[a]lthough the ALJ did discuss deficiencies 3 and 4 out of the *apparent kindness of her heart*, *this court will not review or discuss those findings further* as they never should have been considered to begin with." (App. Vol. II: 014, ¶ 34 (emphasis added.))

Whether the ALJ addressed HEC's arguments out of "kindness" is irrelevant. The material question presented on judicial review was whether the ALJ was legally correct in treating those arguments as improperly raised "new claims" in the first place. AOPA required the trial court to review and decide that question independently, not accept the ALJ's characterization as the premise for refusing to review it. Yet the trial court did exactly that. It affirmed the ALJ's erroneous conclusion that HEC improperly raised new claims. It then compounded that error by refusing to review the ALJ's alternative ruling that the TBEL/BPJ arguments fail on their merits.

But HEC did not amend its pleading or raise new claims through its response brief. It rebutted AESI and IDEM's arguments by supplying additional legal authority demonstrating why the operative facts alleged in HEC's administrative petition state a colorable claim for relief. HEC's administrative petition alleges that IDEM violated the CWA by allowing Eagle Valley to mix the RO waste stream containing removed coal-ash contaminants back into the spent process water discharged to the White River rather than requiring its proper disposal. (App. Vol. X: 208, ¶12.) AESI and IDEM moved to dismiss arguing IDEM had no authority under the CWA to require this. (*See* App. Vol. X: 184-86.) In response, HEC presented established legal authorities governing TBELs and IDEM's exercise of BPJ demonstrating that AESI and IDEM are wrong—IDEM can and must set TBELs on Eagle Valley's coal ash discharges to the White River based on the Best Available Technology ("BAT") to achieve that outcome. (App. Vol. X: 128-31.) HEC did not change the agency action at issue. It did not add new operative facts. And it did not alter the relief sought. Simply put, HEC presented additional legal authority in support of its existing claim, which is precisely what Indiana law allows.

Indeed, Indiana law recognizes the distinction between raising a new claim and advancing additional legal arguments in support of an existing one. Under Indiana's notice-pleading standard,

a pleading need not identify a particular legal theory or recite every element of a cause of action; it need only allege operative facts sufficient to place the opposing party on notice of the claim. *See Palacios v. Kline*, 566 N.E.2d 573, 576 (Ind. Ct. App. 1991); *Bayer Corp. v. Leach*, 147 N.E.3d 313, 315 (Ind. 2020). Accordingly, a later refinement or change in the legal theory supporting the same underlying factual circumstances does not create a new cause of action. *McCarty v. Hosp. Corp. of Am.*, 580 N.E.2d 228, 231 (Ind. 1991).

Indiana courts recognize the same distinction in determining whether a party has waived an argument on appeal. Although a party may not raise for the first time on appeal, "substantive questions independent in character and not within the issues or not presented [below] to the trial court," the party may advance new arguments and legal authorities supporting an issue already presented. *Moryl v. Ransone*, 4 N.E.3d 1133, 1136 (Ind. 2014) (quoting *Bielat v. Folta*, 229 N.E.2d 474, 475 (Ind. Ct. App 1967)); *Collins Asset Grp., LLC v. Alialy*, 139 N.E.3d 712, 715 (Ind. 2020). In *Moryl*, for example, the Indiana Supreme Court concluded that a plaintiff did not waive her timeliness argument on appeal by relying on a statutory provision not cited below because the substantive question—whether her complaint was timely—was already before the trial court. 4 N.E.3d at 1139. Likewise, the Supreme Court in *Collins Asset Group* concluded that the plaintiff's failure to cite a particular UCC statute of limitations provision below did not preclude the plaintiff from citing it on appeal where the overarching statute of limitations issue had already been raised and litigated. 139 N.E.3d at 715. The Court observed that "[a] 'crucial factor' in determining whether a party may raise 'what appears to be a new issue' on appeal is whether the other party 'had unequivocal notice of the existence of the issue and, therefore, had an opportunity to defend against it.'" *Id.* at 714-15 (quoting *Moryl*, 4 N.E.3d at 1136-37). That is not a question here.

HEC did not wait until judicial review—much less appeal—to identify additional CWA authority in support of its CCR Discharge Claim. HEC presented it to the ALJ herself in briefing IDEM and AESI's motions to dismiss**,** and they had a full opportunity to address that additional authority in reply. (App. Vol. X: 126-137.) There was no new substantive question, no new factual basis for liability, and no lack of notice or opportunity to respond. HEC simply supplied additional legal authority supporting the CWA claim already before the ALJ.

That conclusion follows with even greater force under Indiana's notice-pleading standard, adopted in AOPA proceedings, where a party's administrative petition is to be "liberally construed" and "need not 'enumerate precisely every event to which a hearing examiner may finally attach significance.'" *Ind. Off. of Env't Adjudication, Dep't of Env't. Mgmt. v. Kunz,* 714 N.E.2d 1190, 1195–96 (Ind. Ct. App. 1999) (quoting *L.G. Balfour Co. v. Federal Trade Comm'n*, 442 F.2d 1, 19 (7th Cir. 1971)). Likewise, Trial Rule 8 requires only "a short and plain statement of the claim showing that the pleader is entitled to relief" and directs courts to construe pleadings "to do substantial justice" and decide cases on their merits. *See* T.R. 8(A), (F).

This is why a complaint—or here, an administrative petition—is sufficient under Trial Rule 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; *see also Anonymous Physician 1,* 153 N.E.3d at 277 (if the facts alleged in a complaint are capable of supporting a legally actionable injury under *any scenario*, a 12(B)(6) motion to dismiss must be denied (emphasis added)). And in an AOPA proceeding like this, the Indiana Supreme Court made clear that an ALJ cannot prematurely terminate a claim without giving the petitioner an opportunity to "provide additional evidence or to develop the arguments more fully." *Huffman v. Ind. Off. Of Env't Adjudication,* 811 N.E.2d 806, 814 (Ind. 2004). Yet, that is precisely what happened here.

If allowed to stand, the ALJ's ruling would turn Indiana's notice-pleading standard on its head. It would effectively require AOPA petitioners to fully develop and present every legal argument and authority supporting their claims in their initial petitions, rather than allowing those arguments to be developed during briefing and discovery. That is particularly untenable given that AOPA affords petitioners a mere 15 days after notice of an agency decision to seek administrative review. I.C. § 4-21.5-3-7(a)(3). In a technically complex permitting matter such as this, that abbreviated period is hardly sufficient to investigate the agency's decision, much less anticipate and allege every legal basis for challenging it. And in any event, courts must 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). Accordingly, this Court should set aside the ALJ's erroneous "new claims" finding and reverse the trial court's reliance on that finding as a basis to both refuse to review relevant legal authorities and uphold the ALJ's erroneous dismissal of HEC's CCR Discharge Claim.

3. The ALJ Disregarded Controlling CWA Authorities that Require Technology-Based Effluent Limits on the Coal Ash Pollutants in Eagle Valley's Discharges.

In moving to dismiss HEC's CCR Discharge Claim, IDEM insisted that it had no authority under the CWA to require AESI to properly dispose of the internal waste stream generated by the RO treatment system. (App. Vol. X: 185.) In response, HEC demonstrated otherwise: the CWA authorizes—and requires—IDEM to impose best available technology ("BAT")-based effluent limitations on the coal ash contaminants in Eagle Valley's discharges to the White River to achieve that result. (App. Vol. X: 128-31.) The ALJ rejected HEC's argument, stating that while HEC "believes" IDEM was required to impose BAT-based limits to "require proper disposal of CCR contaminants," HEC "offers no cogent support for its contention that . . . BAT applied to the

combined waste streams and did not provide operative facts necessary to set forth an actionable claim." (App. Vol. X: 118, ¶ 13.) This is simply not so.

The purpose of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a); *see also*, *e.g.*, *City of Milwaukee v. States of Illinois and Michigan*, 451 U.S. 304, 318 (1981). To that end, the CWA makes unlawful the discharge of any pollutant by any person into the nation's navigable waters, unless otherwise permitted. 33 U.S.C. §§ 1311(a), 1362(7), (12). A "key regulatory tool" of the CWA is the nation-wide effluent limitation guidelines ("ELGs") set by the EPA to govern pollutant discharges from "classes and categories of point sources." *Sw. Elec. Power Co. v. United States EPA*, 920 F.3d 999, 1004-05 (5th Cir. 2019) (quoting 33 U.S.C. § 1314(b)).

ELGs are "based on technological feasibility rather than on water quality." *Id.* at 1005. Stated differently, ELGs "'require industry, regardless of a discharge's effect on water quality, to employ defined levels of technology to meet effluent limitations.'" *Id.* (quoting *Am. Petroleum Inst. v. E.P.A.*, 661 F.2d 340, 344 (5th Cir. 1981)). These technology-based effluent limitations ("TBELs") are generally "applied prior to or at the point of discharge" and must 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." 40 C.F.R. § 125.3(e), (g) (emphasis added).

Unlike water-quality-based effluent limits ("WQBELs"), TBELs are based on available pollution-control technology "regardless of the receiving water's quality." *Riverkeeper, Inc. v. United States EPA*, 358 F.3d 174, 184-85 (2d 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, TBELs 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 556, 563-64 (2d Cir. 2015).

As IDEM explained in its Fact Sheet for the NPDES Permit, EPA has established ELGs for steam electric generating facilities like Eagle Valley ("Steam Electric ELGs"). (App. Vol. XI:118.) Those ELGs employ two levels of pollution control: Best Practicable Control Technology ("BPT") and Best Available Control Technology ("BAT"). (App. Vol. XI: 118); *see also* 33 U.S.C. § 1311(b)(1)(A), (b)(2)(A); 40 C.F.R. § 401.12(b). BPT is the less stringent standard and considered only a "first step" toward the CWA's pollution-elimination goal. *Sw. Elec. Power Co.*, 920 F.3d at 1006 (citing *EPA v. Nat'l Crushed Stone Ass'n*, 449 U.S. at 69). As such, BPT-based limits "represent the average of the best levels of performance" within an industry category or subcategory "for control of *conventional* pollutants." *Id.* (quoting *Chem. Mfrs. Ass'n v. U.S. E.P.A.*, 870 F.2d 177, 203 (5th Cir. 1989)) (emphasis added).

On the other hand, toxic pollutants are subject to the more stringent BAT standard that should "reflect the amount of pollutant that would be discharged by a point source employing the best available technology" that is "economically feasible across the [industry] category or subcategory as a whole." *Sw. Elec. Power Co.*, 920 F.3d at 1006 (quoting *Texas Oil & Gas Ass'n v. U.S. E.P.A.*, 161 F.3d 923, 928 (5th Cir. 1998)). That means BAT limits must "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.* (quoting *Chem. Mfrs. Ass'n*, 870 F.2d at 226; *EPA v. Nat'l Crushed Stone Ass'n*, 449 U.S. at 75)).

Of significance here, when an industry ELG applies "only to certain aspects of the discharger's operation, or to certain pollutants," the permit writer must establish TBELs for those uncovered aspects or pollutants "on a case-by-case basis" using "best professional judgment" ("BPJ"). 40 C.F.R. §§ 125.3(c)(3), (a)(2). And when those pollutants are toxic ones, the case-specific TBELs 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 nonconventional pollutants since March 31, 1989"). IDEM failed to do that here.

As IDEM explained in briefing, the Steam Electric ELGs cover three separate waste streams at Eagle Valley. (App. Vol. XII: 105.) And because those waste streams are combined before discharge, IDEM set case-specific TBELs for the combined discharge. (App. Vol. XII: 106.) Specifically, IDEM set TBELs for certain conventional pollutants in the combined discharge based on the less-stringent BPT limits required by the ELG for just one of waste streams in that discharge referred to as "low volume wastewater." (App. Vol. XII: 106.)

However, IDEM concluded that because the Steam Electric ELG "does *not* include limits for CCR contaminants or [CCR] waste streams," it did not have to calculate TBELs for those contaminants or the RO waste stream containing them even though that waste stream is also combined with the ultimate discharge to the River. (App. Vol. XII: 105-07 (asserting further that it did not have to calculate case-specific TBELs "for any wastestreams or pollutants outside of what [is] required by the applicable ELGs.")) The ALJ agreed with that view concluding that "IDEM properly applied its [BPJ] for [Eagle Valley's] low volume wastewater and included the appropriate [BPT-based] TBELs" in the Permit. (App. Vol. X:118-19, ¶¶ 14-15)

The ALJ's conclusion turns the governing CWA regulation on its head. That regulation expressly mandates that permit writers must set "case-by-case" TBELs when "*certain aspects* of the discharger's operation, *or certain pollutants*" are not covered by the industry's ELG. 40 C.F.R. § 125.3(c)(3) (emphasis added). Thus, the absence of ELG limits for the coal ash pollutants in Eagle Valley's RO waste stream did not relieve IDEM of its obligation to impose case-specific TBELs on those pollutants or waste stream—it triggered the obligation.

Furthermore, since those coal ash contaminants are toxic pollutants[7] they are subject to the BAT level of pollution control. 40 C.F.R. § 125.3(a)(2)(iii), (iv). That means that IDEM's imposition of the less-stringent BPT-based TBELs on just a few conventional pollutants in the combined discharge, but no TBELs whatsoever on the toxic pollutants in that same discharge, violates this CWA requirement on its face.

For that matter, in setting case-specific TBELs, IDEM was *required* to impose limits that "control all toxic pollutants" that "are or may be discharged at a level greater than the level which can be achieved by the technology-based treatment requirements *appropriate to the permittee* under § 125.3(c)." 40 C.F.R. § 122.44(e)(1) (emphasis added). Moreover, IDEM was required to "consider the appropriate technology for the category or class of point sources of which the applicant is a member, based upon *all information* and *any unique factors relating to the applicant."* 40 C.F.R. § 125.3(c)(2) (emphasis added). And in setting BAT-based TBELs in particular, IDEM was required to consider, among other things, the "facilities involved." 40 C.F.R. § 125.3(d)(3) (emphasis added).

[7] EPA has identified 65 pollutants and classes of pollutants as "toxic pollutants." 40 CFR § 401.15. Those include antimony, arsenic, barium, cadmium, cobalt, lead, lithium, molybdenum, thallium, and selenium, which are also CCR contaminants that IDEM identified in Eagle Valley's discharges to the White River. (App. Vol. VI: 080-81)

Here, those "facilities" and "unique factors" at Eagle Valley include the RO treatment system already being used to remove the toxic coal ash contaminants from the pumped groundwater before it is used as process water in the plant. That technology is not hypothetical and demonstrates that the contaminants can be removed from the facility's intake water. HEC's administrative petition alleges that IDEM was required to account for this existing technology in establishing Permit conditions, including a requirement for proper disposal of the RO waste stream rather than allowing it to be discharged to the White River. (*See* App. Vol. X: 208, 219, ¶¶ 12, 57.) At minimum, those pleading allegations establish a viable basis for relief under the governing law to overcome a TR 12(B)(6) motion to dismiss.

Finally, in rejecting HEC's CCR Discharge Claim, the ALJ observed that although IDEM did not impose TBELs on the coal ash contaminants in Eagle Valley's discharge, it did conduct a reasonable potential to exceed analysis and imposed monitoring requirements as a result. (App. Vol. X:119, ¶ 16.) While that is true, it is irrelevant. Those measures address the separate requirements governing WQBELs and compliance monitoring. *Infra* at 48-49. They do not relieve IDEM of its separate obligation to establish TBELs for toxic pollutants under the CWA. As explained above, TBELs are based on available pollution-control technology regardless of applicable water quality criteria. *See Riverkeeper,* 358 F.3d at 184-85; *NRDC v. EPA,* 808 F.3d 556, 563-64 (2nd Cir. 2015).

In sum, HEC's pleading allegations concerning Eagle Valley's existing RO treatment system, together with the CWA authorities developed in briefing, establish a legally viable basis for its CCR Discharge Claim. The ALJ nevertheless dismissed that claim by recasting it as an improper collateral attack on AESI's compliance with the CCR Rule, treating HEC's additional CWA authorities as two "new" claims, and alternatively rejecting those authorities based on a

misapplication of the governing law. None of these grounds supports dismissal under Trial Rule 12(B)(6). The trial court erred in upholding that dismissal and refusing to review the ALJ's alternative ruling on the merits. This Court should reverse the trial court and set aside the ALJ's unlawful dismissal of HEC's CCR Discharge Claim.

4. The ALJ Improperly Dismissed HEC's Antidegradation Claim Based On What Amounts to an Affirmative Time-Bar Defense that Has No Foundation in the Law.

The ALJ erroneously dismissed HEC's Antidegradation Claim under Trial Rule 12(B)(6) based on what amounts to an affirmative time-bar defense that has no merit. HEC's Antidegradation Claim challenges IDEM's decision to include new mercury limits in Eagle Valley's NPDES Permit without requiring antidegradation review as required by 327 IAC 2-1.3-5 and -6. (App. Vol. X: 219-221, ¶¶ 58-63.) The ALJ concluded the claim was time-barred because HEC did not challenge IDEM's earlier 2015 permitting decision that antidegradation review was not necessary based on projected lowering of pollution discharges once Eagle Valley converted from coal to natural gas. (App. Vol. X: 117-18, ¶¶ 10-11.) There are at least four problems with this.

First, it disregards HEC's pleading allegations, which the ALJ was required to accept as true. Those allegations make clear that HEC is not seeking to reopen IDEM's antidegradation determination from 2015. Rather, HEC is challenging IDEM's determination in issuing the March 2023 Permit that antidegradation review was not necessary. (App. Vol. X: 220, ¶ 60.) Indeed, IDEM's 2023 Fact Sheet, quoted in HEC's administrative petition, sets forth IDEM's decision that HEC challenges here:

> This permit includes new effluent limitations for mercury. In accordance with 327 IAC 2-1.3-1(b), the new effluent limitations are not subject to the Antidegradation Implementation Procedures in 327 IAC 2-1.3-5 and 2-1.3-6 *as the new effluent limitations are not the result of a deliberate activity taken by the permittee*.

(App. Vol. VI: 085; Vol. X: 220-21, ¶ 60 (emphasis added).) That is the agency decision at-issue here. And that decision, and the rationale for it, is subject to administrative review regardless of what IDEM may have done or decided in the past. *See* I.C. § 4-21.5-3-7 (allowing administrative review of agency decisions); I.C. § 13-15-6-1 (allowing administrative review of IDEM decisions).

Second, the ALJ's ruling is contrary to Trial Rule 12(B)(6) because it amounts to granting an affirmative time-bar defense raised by IDEM and AESI. A motion to dismiss under 12(B)(6) tests the legal sufficiency of the complaint, not the sufficiency of an affirmative defense. *Bellwether Properties*, 87 N.E.3d at 464, 466-67. As such, dismissal on statute of limitations grounds is appropriate only "where the 'complaint shows on its face that the statute of limitations has run.'" *Id.* (quoting *Nichols v. Amax Coal Co.*, 490 N.E.2d 754, 755 (Ind. 1986)). That is not the situation here. The only time limitation on seeking administrative review is AOPA's 15-day window for doing so. I.C. § 4-21.5-3-7(a)(3)(A); I.C. § 13-15-6-1. There is no question that HEC timely sought administrative review of IDEM's 2023 permitting decision within that window. There is no statute, regulation, or other legal authority cited by the ALJ—because none exist—that transformed HEC's otherwise timely-filed petition into an untimely one simply because HEC did not challenge a separate decision IDEM made eight years earlier.

Third, IDEM's 2015 and 2023 antidegradation determinations rest on materially different information. As alleged in HEC's administrative petition—based on a direct quote from IDEM's Fact Sheet for the 2023 Permit—the agency's 2015 decision not to include mercury limits or require antidegradation review was based on AESI's "estimates" and "projections" that pollutant loadings would decrease once Eagle Valley converted from coal to natural gas. (App. Vol X: 220-21, ¶ 62.) But actual effluent data from the new natural gas plant, submitted for the 2023 Permit, showed that AESI's earlier estimates were wrong and mercury limits were necessary:

> As part of the permit modification issued December 17, 2015 . . . [t]he facility also provided estimates of effluent quality from the [natural gas] 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 [natural gas] 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*.

(App. Vol. VI: 085; Vol. X: 220-21, ¶ 62 (emphasis added))

In other words, just as HEC alleged, IDEM included the new mercury limits in the 2023 Permit because actual effluent data following the change in operations from coal to natural gas demonstrated the need for those limits. IDEM's determination otherwise—that antidegradation review is not necessary because the mercury limits are somehow not due to the change in operations—is the agency action that HEC is challenging now. (Vol. X: 219-221, ¶¶ 58-63) And that action is reviewable on its own terms regardless of IDEM's past decisions.

Fourth, nothing in Indiana's antidegradation regulations supports the ALJ's conclusion that IDEM's 2015 decision precludes review of IDEM's 2023 decision. Indiana's antidegradation 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." 327 IAC 2-1.3-1 (emphasis added). This provision cannot be read to preclude antidegradation review of a new or increased loading caused by a change in operation, simply because the new or increased loading was not discovered until after the change in operation occurred. To hold otherwise, as the ALJ did, would allow industries 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." I.C. § 13-15-7-1(4). 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. (App. Vol. VI: 079 (emphasis added).) The ALJ's conclusion that IDEM's 2015 determination bars HEC's Antidegradation Claim has no foundation in the law and should have been set aside by the trial court.

In sum, the ALJ dismissed HEC's CCR Discharge and Antidegradation Claims without applying the governing Trial Rule 12(B)(6) standard. In both instances, the ALJ disregarded HEC's pleading allegations and misapplied the relevant law. The trial court erred in upholding those unlawful dismissals. This Court should therefore reverse the trial court and set aside the ALJ's rulings so that HEC may finally obtain a fair determination on the merits.

### D. The ALJ Erred in Granting Summary Judgment for AESI and IDEM Rather Than HEC on the Mercury and Cancer-Criteria Claims.

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." I.C. § 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 as to any material fact and that the moving party is entitled to a judgment as a matter of law." T.R. 56(C).

While the purpose of summary judgment "is to terminate litigation when no factual dispute exists and when the case may be determined as a matter of law," it "must be granted with caution . . . so that a party's right to a fair determination of genuine issues is not thwarted." *Vanco v. Sportsmax*, *Inc.*, 448 N.E.2d 1198, 1200 (Ind. Ct. App. 1983) (citations omitted). To that end, the

burden is on the moving party "to negate the existence of any genuine issue of material fact" and "[a]ll doubts are to be resolved against him." *Id.* The court "must consider all the pleadings, depositions, answers to interrogatories, admissions, and affidavits on file, as well as any testimony, to determine whether a genuine issue of material fact exists." *Id.* (emphasis added). Furthermore, "[t]he products of discovery are to be liberally construed in the opponent's favor." *Id.* And "[e]ven if the facts are not in dispute, summary judgment is *inappropriate* when a good faith dispute exists regarding the inferences to be drawn from these facts." *Id.*

The ALJ failed to follow this established standard in granting summary judgment for AESI and IDEM on HEC's Mercury and Cancer-Criteria Claims. Unlike HEC's prematurely dismissed CCR Discharge and Antidegradation Claims, these two claims proceeded through discovery and summary judgment briefing, during which HEC developed and designated undisputed evidence supporting both claims. That evidence includes IDEM's own sworn admissions, records, and technical documents. Yet the ALJ granted summary judgment for Appellees by misconstruing HEC's claims, disregarding designated material evidence, and misapplying the governing CWA requirements to the undisputed facts. For its part, the trial court upheld the ALJ's rulings without engaging with the designated evidence in any way or explaining how the governing law supported summary judgment for AESI and IDEM.

As detailed below, the ALJ's misapplication of Trial Rule 56(C), which the trial court failed to correct, is evident in two key respects. First, the ALJ recast HEC's Mercury Claim as two separate challenges and then disregarded the governing CWA requirements, EPA guidance, and IDEM's sworn admission supporting the claim HEC actually made. Second, as to HEC's Cancer-Criteria Claim, the ALJ likewise disregarded the relevant CWA requirements and EPA guidance. Those authorities confirm that IDEM was required to evaluate whether known carcinogens in

Eagle Valley's discharges have a reasonable potential to exceed Indiana's WQC for protecting human health from cancer risk, notwithstanding that the criterion is expressed in narrative rather than numeric form. In both instances, the undisputed evidence demonstrates that HEC is entitled to summary judgment as a matter of law. Accordingly, the ALJ's grant of summary judgment for AESI and IDEM is contrary to Trial Rule 56(C). This Court should therefore reverse, set aside the ALJ's summary judgment rulings, and direct entry of summary judgment for HEC on both claims.

1. The ALJ Mischaracterized HEC's Mercury Claim, Disregarded Relevant Law and EPA Guidance, and Ignored IDEM's Sworn Admission that the Permit's Monitoring Frequency Cannot Assure Compliance with the Permit's Mercury Limits.

The ALJ's fundamental error in granting summary judgment for AESI and IDEM on HEC's Mercury Claim was her failure to address the claim HEC actually made. Although the ALJ acknowledged that HEC contends "the mercury limits and monitoring requirements that IDEM imposed in [the] Permit do not assure compliance with Indiana's [water quality criteria] for mercury," she nevertheless treated HEC's claim as two separate challenges—one to IDEM's calculations in deriving the Permit's maximum daily limit ("MDL") of 20 ng/l and the other to the monitoring frequency IDEM imposed. (App. Vol. II: 099-103, ¶¶ 3-13.) The ALJ then concluded that HEC "proffered no evidence" supporting its challenge to the MDL, failed to demonstrate that IDEM's calculations to derive the MDL violated applicable law or EPA guidance, and offered "no legal support" for its contention that the monitoring frequency was unlawful. (App. Vol. II: 099, 101-103, ¶¶ 3, 10, 13.) These conclusions disregard both the claim HEC made and the undisputed designated evidence and legal authorities supporting it.

HEC's Mercury Claim has always been that the Permit's MDL of 20 ng/l, *combined with* a monitoring frequency of only one grab sample every other month, cannot assure compliance with either the Permit's average monthly limit ("AML") of 12 ng/l or the underlying water-quality

criterion ("WQC") for mercury of 12 ng/l. (App. Vol. X: 221-22, ¶¶ 64-66.) Contrary to the ALJ's characterization, HEC is not "argu[ing] that because the chronic water quality criterion for mercury is 12 ng/l, 'a WQBEL in a NPDES permit limit must likewise be 12 ng/l.'" (App. Vol. II: 100, ¶ 7.) Indeed, when AESI advanced that same mischaracterization of HEC's claim in discovery, HEC expressly corrected it:

> **[AESI] Interrogatory No. 2:**
> Provide factual information and the legal basis for Your claim that the Permit's Mercury daily maximum limit should be 12 ng/l . . .
>
> **[HEC] Answer:**
> Petitioner's counsel objects to this Interrogatory because it misstates the claim set forth in the Third Deficiency of HEC's Amended Petition at ¶¶64–66. The claim is based on the fact that setting a daily maximum limit for Mercury at 20 ng/l will not ensure compliance with the monthly average limit or the WQC for Mercury of 12 ng/l because the Permit requires monitoring just once every other month . . .
>
> [I]t is a basic mathematical principle that the average of one number is the number itself. Stated differently, the average of one monthly grab sample is the value of the sample itself.

(App. Vol. IX: 245-46.)

The governing law supports this claim. Under Indiana's water-quality standards, mercury is a bioaccumulative chemical of concern ("BCC") subject to a chronic aquatic-life WQC of 12 ng/l, expressed as a four-day average. 327 IAC 2-1-6(a)(2)(A), (a)(3), Table 6-1. And because mercury is a BCC, the applicable WQC "shall be applied directly to the undiluted discharge." 327 IAC 5-2-11.1(b)(6). In other words, no dilution or "mixing zones" are allowed in setting a water quality-based effluent limit ("WQBEL") for a BCC like mercury. "[T]he relevant water quality criterion must be attained at the point of discharge." (App. Vol. X: 018 (EPA, NPDES Permit Writers' Manual, Ch. 6: Water Quality-Based Effluent Limitations, 6-16).) The regulations and EPA guidance confirm this, as did IDEM in issuing the 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).

(App. Vol. VI: 118.)

IDEM also confirmed in its Fact Sheet that Eagle Valley's mercury discharges have a reasonable potential to exceed the applicable WQC of 12 ng/l, requiring IDEM to impose WQBELs to ensure this WQC is met. (App. Vol. VI: 081, 091, 118, 127–28.) Accordingly, IDEM established an AML of 12 ng/l and an MDL of 20 ng/l in Eagle Valley's NPDES Permit. (App. Vol. VI: 006-07, 81, 91.)

But the CWA requires more than establishing effluent limitations, it also requires NPDES permits to impose monitoring requirements sufficient to "assure compliance with permit limitations." 40 C.F.R. § 122.44(i)(1); *see also* 327 IAC 5-2-13(a). And that required monitoring must be of the "type, intervals, and frequency sufficient to yield data which are representative of the monitored activity including, when appropriate, continuous monitoring." 40 C.F.R. § 122.48(b); 327 IAC 5-2-13(c)(2). Thus, while IDEM has discretion to determine the appropriate monitoring frequency, that discretion is constrained by the express regulatory requirements that monitoring assure compliance with the permit's limits and yield data that is representative of the monitored discharge.

Here, the monitoring frequency IDEM imposed cannot meet these requirements. The NPDES Permit requires AESI to take one grab sample every other month to demonstrate compliance with both the maximum daily limit ("MDL") of 20 ng/l and the average monthly ("AML") of 12 ng/l for mercury, even though Eagle Valley discharges approximately 1.3 million gallons of wastewater to the White River every day, year-round. (App. Vol. VI: 007, 081, 091, 116.) In other words, IDEM set a frequency for monitoring Eagle Valley's continuous discharge of

a dangerous BCC that provides no data about that discharge 359 days of the year. By any reasonable measure, that is a markedly insufficient frequency and certainly does not "yield data which are representative of the monitored activity." *See* 40 C.F.R. § 122.48(b).

It also creates an obvious math problem because the average of the single required grab sample taken in a particular month is the sample itself. Thus, a sample measuring 20 ng/l satisfies the Permit's maximum daily limit but violates the average monthly limit of 12 ng/l. Indeed, IDEM admitted this very basic math problem in its sworn answers to discovery, acknowledging that "if Eagle Valley takes only one mercury sample in a given month and that sample is above 12 ng/l that would violate the monthly average limit but not the daily maximum limit." (App. Vol. V: 236.) The ALJ ignored this sworn admission, which is all but dispositive of HEC's Mercury Claim.

The ALJ also ignored relevant sections of EPA's *Technical Support Document for Water Quality-Based Toxics Control* ("TSD") that explain precisely why this result is impermissible. The TSD directs that permit limits must reflect the expected variability in pollutant discharges. (App. Vol. III: 114-17.) In most circumstances, the MDL is supposed to be higher than the AML to allow for fluctuations in the discharges. (App. Vol. III: 117.) However, when monitoring occurs less frequently than monthly, the long-term average on which the monthly limit is based cannot be accurately characterized. (App. Vol. III: 117.) Put simply, the daily maximum permit limit should account for short-term variability in discharges while the monthly average ensures compliance with long-term water-quality standards. But where both limits are derived from a single measurement taken only once every other month, the "average" and the "maximum" become the same number, as IDEM itself admitted under oath.

To avoid this outcome, Section 5.5.3 of the TSD directs that when sampling occurs once per month or less, "at least four" monthly samples must be assumed to derive statistically valid

limits. Otherwise, the average monthly limit converges with the daily maximum—exactly the situation here. (App. Vol. III: 128-131); *see also Am. Petroleum Inst. v. EPA*, 661 F.2d 340, 365 (5th Cir. 1981) (confirming that "if sampling is required only on a monthly basis, the monthly average limitation would be the same as the daily maximum"). By setting the MDL higher than the AML but requiring only one sample every other month to demonstrate compliance with both, IDEM ignored the TSD's statistical framework and effectively rendered the two limits indistinguishable. The result is a permit that provides no meaningful assurance that the monthly average permit limit of 12 ng/l and mercury WQC will be met.

All of this was presented to the ALJ, who disregarded it and instead adopted AESI's mischaracterization of HEC's Mercury Claim. Specifically, the ALJ concluded that HEC contends that "because the chronic water quality criterion for mercury is 12 ng/l, 'a WQBEL in a NPDES permit limit must likewise be 12 ng/l.'" (App. Vol. II: 100, ¶ 7 (quoting HEC's Amended Petition, ¶ 65.)) She then devoted several paragraphs to reproducing IDEM's mathematical calculations for deriving the Permit's MDL of 20 ng/l under EPA's TSD and concluded that "HEC did not meet its burden of proving IDEM's calculations . . . do not comply with 327 IAC 5-2-11 or the TSD." (App. Vol. II: 101-102, ¶¶ 8-10.)

But again, HEC never challenged the mathematical accuracy of IDEM's calculations for deriving the MDL for mercury. Nor did HEC contend that the MDL must always equal the mercury WQC of 12 ng/l. Indeed, HEC expressly rejected that characterization in discovery and repeatedly in briefing. (App. Vol. II: 121-25, 229-30; Vol. IX: 245-46; Vol. XII: 056-57, 226-27.) The ALJ's lengthy discussion of the distinction between water-quality criteria and effluent limits, and her detailed calculations supporting the MDL of 20 ng/l, are beside the point. So too is the trial court's observation of those calculations in the ALJ's ruling as a basis to uphold her ruling. (App. Vol. II:

017, ¶ 63.) The question is not whether IDEM correctly calculated the MDL, but whether the monitoring frequency IDEM imposed can ensure compliance with the Permit's AML of 12 ng/l and the underlying mercury WQC. It cannot, as IDEM itself admitted under oath.

Nevertheless, the ALJ concluded that because 327 IAC 5-2-13(c)(2) "does not establish specific monitoring frequencies for NPDES permits," IDEM has unfettered discretion to set one. (App. Vol. II: 102-103, ¶¶ 11-13.) Not so. As explained above, the CWA unambiguously requires the permit writer to impose monitoring that is sufficient to assure compliance with permit limitations and yield representative data. 40 C.F.R. §§ 122.44(i)(1), 122.48(b); 327 IAC 5-2-13(a), (c)(2). And Section 5.7.5 of EPA's TSD—the very provision the ALJ cited—explains that monitoring frequency must be determined on a "case-specific" basis, considering such factors as the "environmental significance and nature of the pollutant," "effluent variability," "compliance history," and the "number of monthly samples used in developing the permit limit." (App. Vol. III: 134.) EPA's TSD further explains that "ideally 10 or more samples per month" provide "the greatest statistical likelihood that the average of the various monthly values will approach the true monthly LTA [long-term average] value." (App. Vol. III: 134 (emphasis added).) While EPA recognizes that the appropriate monitoring frequency may reflect a "reasonable compromise" of these considerations, that discretion must still be exercised consistently with the CWA's mandatory monitoring requirements. (App. Vol. III: 134.)

Here, IDEM required just six grab samples *per year* to monitor a continuous discharge of approximately 1.3 million gallons of wastewater *per day* containing mercury—a highly toxic, bioaccumulative pollutant whose WQC must be applied directly to the undiluted discharge. (App. Vol. VI: 007, 011, 091.) Yet the ALJ never explains how such infrequent sampling satisfies the case-specific considerations identified by EPA. Nor did the ALJ explain how the monitoring

infrequency IDEM imposed assures compliance with the Permit's AML and the underlying mercury WQC—especially in light of IDEM's sworn admission that it does not.

Instead, the ALJ 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)." (App. Vol. II: 103, ¶ 13.) This conclusion not only disregards the detailed discussion of the undisputed facts and controlling law that HEC provided, 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.

That statutory provision 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." I.C. § 13-15-6-2(6). 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. Off. of Env't Adjudication, Dep't of Env't 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 dismissal "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) (quoting *L.G. Balfour Co. v. Federal Trade Comm'n*, 442 F.2d 1, 19 (7th Cir. 1971)).

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). (App. Vol. X: 221, ¶ 66.) Since the undisputed evidence shows that IDEM failed to do that here, the ALJ should have granted summary judgment for HEC on this issue.

For its part, the trial court upheld the ALJ's grant of summary judgment for IDEM and AESI on the Mercury Claim. In doing so, the court characterized the ALJ's "discussion" of the claim as "thorough" and HEC as making "broad stroke allegations of problems without identifying the specific problems necessary to address and argue appropriately in a summary judgment matter." (App. Vol. II: 017, ¶¶ 62, 64.) But the "thoroughness" of the ALJ's discussion does not establish that her ruling is correct. And the notion that HEC made "broad stroke allegations" without support is to ignore the record in its entirety. HEC was entitled to have the trial court independently review the ALJ's summary judgment ruling under the controlling Trial Rule 56 standard. It plainly did not do that here. The trial court did not identify any designated evidence. It did not mention a single legal authority. It provided no explanation as to why the designated evidence and governing law warranted summary judgment for AESI and IDEM but not HEC. As a result, HEC did not receive the independent judicial review AOPA requires. This Court should correct the error, reverse the trial court, set aside the ALJ's erroneous ruling, and grant summary judgment for HEC.

2. In Upholding IDEM's Failure to Evaluate the Narrative Cancer Criterion, the ALJ Disregarded CWA Requirements, EPA Technical Guidance, and Designated Evidence.

There is no dispute that IDEM identified arsenic, beryllium, cadmium, and lead in Eagle Valley's discharges as "probable or known human carcinogens," yet failed to evaluate whether those pollutants have a reasonable potential to exceed Indiana's water-quality criterion ("WQC") for protecting human health from cancer. (App. Vol. VI: 127-28 (end note 6); Vol. VI: 134.) IDEM maintained that it was not required to conduct that evaluation because the cancer criterion is expressed in narrative rather than numeric form. (App. Vol. V: 233-34; Vol. XII: 114-15.) The ALJ

accepted that position in granting summary judgment for AESI and IDEM. (App. Vol. II: 103-04.) This was clear error.

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 the regulation 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, EPA guidance interpreting this regulation 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.

(App. Vol. X: 025 (U.S. EPA, *NPDES Permit Writers' Manual, Ch. 6: Water Quality-Based Effluent Limitations,* 6.3.1 (emphasis added).)

Nevertheless, the ALJ concluded that IDEM has "discretion to determine when to derive human health cancer criteria." (App. Vol II: 104.) But that conclusion misses the point. Indiana *already has* a human-health cancer criterion, as the ALJ herself acknowledged: "327 IAC 2-1-6(a)(2)(A)(iv) establishes a narrative criterion 'to protect human health from unacceptable cancer risk of greater than one (1) additional occurrence of cancer per one hundred thousand [(100,000)] population.'" (App. Vol II: 104 (quoting 327 IAC 2-1-6(a)(2)(A)(iv)).) Thus, the question was not whether IDEM was required to derive a *new* cancer criterion, but whether it was required to evaluate the known carcinogens in Eagle Valley's discharges against the *existing* criterion in

conducting its RPE analysis. By conflating these distinct questions, the ALJ failed to address the actual legal deficiency HEC challenged.

The ALJ also relied on the draft rule for 40 CFR § 122.44(d) for the proposition that "[t]here is flexibility in the state's interpretation of its narrative water quality criteria," and "water quality-based effluent limits are required only for pollutants present in an effluent *at concentrations of concern* to the permitting authority." (App. Vol II: 104 (quoting 54 Fed. Reg. 23868, 23875 (Jun. 2, 1989)).) There are several problems with this. First, 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. (App. Vol. VI: 117-19.) IDEM simply chose not to conduct the required RPE analysis for Indiana's human health cancer criterion because it is in narrative form.

Second, the draft rule for 40 CFR § 122.44(d) on which the ALJ relied states that "narrative standards have the *same force and effect* as other state water quality standards." 54 Fed. Reg. 23868, 23872 (Jun. 2, 1989) (emphasis added). The draft rule says nothing about a permitting 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 permitting agencies have discretion in *how* they conduct the RPE analysis, but not *whether* to conduct it. As EPA explained, permitting authorities "must use reliable and consistent procedures" to determine whether a discharge has a reasonable potential to exceed an applicable WQC. 54 Fed. Reg. 23868, 23872 (Jun. 2, 1989). Although those procedures may vary among states, the decision whether to impose WQBELs must follow that evaluation. *Id.*

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

> 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.

(App. Vol. III: 114.) In turn, Chapter 3, Section 3.3.8 of the TSD states:

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

(App. Vol. III: 083.)

The ALJ did not address any of this critical EPA guidance. Instead, she concluded that 327 IAC 2-1-6(a)(2)(C) gave 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. (App. Vol. II: 104.) But contrary to the ALJ's conclusion, that provision simply carries out the directive in 40 CFR 122.44(d)(l)(vi) that governs agency discretion in choosing *how,* not *whether,* to conduct the reasonable potential analysis.

Specifically, 327 IAC 2-1-6(a)(2)(A)(iv) establishes Indiana's narrative criterion for protecting human health from unacceptable cancer risk. In turn, subsection (C) provides that IDEM "may" use procedures prescribed in 327 IAC 2-1-8.3 through -8.6 to calculate a continuous criterion concentration ("CCC") for pollutants lacking numeric criteria. Giving IDEM procedural

options for calculating a CCC is not the same as giving IDEM discretion not to do the calculation at all.

Even so, the ALJ adopted AESI's 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. (App. Vol. II: 104.) But aside from common sense dictating that eliminating a cancer threat is a benefit to human health, HEC designated the affidavit testimony of a medical doctor and public health expert, Dr. Indra Frank, who confirmed the serious public health threats associated with Eagle Valley's uncontrolled discharges of carcinogens to the White River. (App. Vol. IV: 114-16, ¶¶ 9-17.) Furthermore, EPA's TSD provides ample evidence of the human health benefits, and the critical need to control discharges of carcinogens into waterways. (App. Vol. III: 058-63.)

EPA's TSD also directs permit writers to use EPA procedures when "developing reference ambient concentrations (RACs) for . . . *site-specific* interpretations of narrative standards and *as a basis for permit limits* under 40 CFR 122.44 (d)(l)(vi)." (App. Vol. III: 058 (emphasis added).) The TSD also provides detailed procedures and formulas for calculating site-specific RACs for carcinogens using current cancer-risk information from EPA's Integrated Risk Information System ("IRIS"). (App. Vol III: 060-63.) Those procedures demonstrate that EPA has provided permitting agencies with established methods for evaluating carcinogenic pollutants against narrative human-health criteria. Yet IDEM did not use these procedures to evaluate the known carcinogens in Eagle Valley's discharges against Indiana's narrative cancer criterion.

Finally, we have no idea if the NPDES Permit would have more stringent limits had IDEM conducted the required RPE analysis for carcinogens in Eagle Valley's discharges based on Indiana's narrative human health cancer criteria, precisely because IDEM failed to do the

evaluation. 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. Whether the results of the evaluation might not have made a difference in the permit limits ultimately imposed, did not relieve IDEM of its statutory obligation to determine if it would have made a difference.

By treating the narrative human-health criterion as unenforceable, IDEM failed to perform the reasonable potential to exceed analysis required by 40 C.F.R. § 122.44(d)(1) and 327 IAC 2-1-6(a)(2)(A)(iv). The ALJ compounded that error by adopting IDEM's rationale, disregarding both the plain text of the governing regulations and the EPA's Technical Support Document and failing to grant summary judgment for HEC on the issue.

For its part, the trial court appeared to fundamentally misunderstand the nature of HEC's Cancer-Criteria Claim and failed to engage in any way with the evidence and law that support it. The trial court upheld the ALJ's ruling based on "a review of the discussion of the *numeric claim*," which according to the trial court made "clear that the allegation itself fails to be supported by evidence that the criteria in place *is not being followed* nor that *something* is in fact deficient in what is being done under this permit." (App. Vol. II: 017, ¶ 65 (emphasis added).) But HEC's Cancer-Criteria Claim concerns Indiana's *narrative* criterion, not a numeric one. And it challenges IDEM's admitted failure to conduct an RPE analysis against that narrative criterion. It has nothing to do with whether the "criteria is being followed."

Also, the trial court apparently relied on the ALJ's "discussion" rather than independently reviewing HEC's actual claim. The trial court did not identify what evidence HEC supposedly failed to provide. It cited no legal authority supporting the ALJ's ruling. And it offered no explanation of why the undisputed evidence and governing law warranted summary judgment for AESI and IDEM rather than HEC. That is not the independent judicial review AOPA requires. This

Court should correct the error, set aside the ALJ's erroneous ruling, and grant summary judgment for HEC on its Cancer-Criteria Claim.

### E. The Trial Court Correctly Set Aside the ALJ's Ruling on Associational Standing but Failed to Apply Trial Rule 56 and the *Hunt* Test or Resolve HEC's Entitlement to Summary Judgment.

The trial court correctly set aside the ALJ's ruling that HEC lacked associational standing, and HEC does not appeal that ruling. However, the trial court's stated rationale for doing so does not reflect AOPA's standard of judicial review, the substantive law of associational standing, or the summary judgment standard under Trial Rule 56.

Specifically, the trial court characterized the ALJ's ruling as "somewhat arbitrary" and "seem[ingly] so disingenuous" given the "voluminous discussions of coal ash, mercury levels, poisons, effects on the water, calculations to determine the safety of said water and the very clear indications by both sides of the very serious and very real regulations and laws put in place to handle these concerns." (App. Vol. II: 015-16, ¶¶ 51, 53.) The trial court further reasoned that if "a larger entity" like HEC "is willing to tackle these complex issues on behalf of citizens [and is] willing to step forward," the entity "is a clear and necessary party/entity in these types of cases." (App. Vol. II: 016, ¶ 55.)

While these concerns are well-founded, they are not the legal standards governing judicial review, summary judgment, or the substantive law of associational standing. AOPA required the trial court to independently determine whether the ALJ's ruling was arbitrary, capricious, an abuse of discretion, contrary to law or procedure, or unsupported by a preponderance of the evidence. *See* I.C. § 4-21.5-5-14. Describing the ALJ's ruling as "somewhat arbitrary" and "disingenuous" without identifying the legal or evidentiary basis for setting it aside, does not satisfy AOPA.

Nor is associational standing a matter of general fairness or whether HEC is a "necessary party" because it is willing to tackle complex environmental issues on behalf of citizens. (*See* App.

Vol. II: 016, ¶ 55.) Associational standing is governed by the three-part test established in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977), and adopted by the Indiana Court of Appeals in *Save the Valley, Inc. v. Indiana-Kentucky Electric Corp.*, 820 N.E.2d 677, 679-82 (Ind. Ct. App. 2005).

Under *Hunt*, HEC has associational standing if (1) its members would have standing in their own right; (2) the interests HEC seeks to protect are germane to its organizational purpose; and (3) neither the claims asserted nor the relief requested requires individual members' participation. *See Save the Valley, Inc.,* 820 N.E.2d at 682. As HEC demonstrated in briefing below, the undisputed designated evidence establishes all three elements. (*See* App. Vol II: 210-229; Vol. XII: 036-50.) HEC established that its members are "aggrieved or adversely affected" by Eagle Valley's NPDES Permit as required to demonstrate standing under AOPA, Ind. Code § 4-21.5-3-7(a)(1)(B). (App. Vol. II: 220-26; Vol. XII: 045-50.) HEC further established that challenging the Permit is germane to HEC's environmental mission. (App. Vol. X: 208-09, ¶¶ 14-15.) And HEC established that its members' individual participation is unnecessary because HEC seeks review and modification of Eagle Valley's NPDES Permit, not individualized damages. (App. Vol. X: 216, 226 ¶ 46.)

The trial court correctly recognized that HEC's members need not have suffered actual injury to be "aggrieved." (App. Vol. II: 16, ¶¶ 56-57); *see Huffman v. Ind. Off. of Env't Adjudication*, 811 N.E.2d 806, 810-12 (Ind. 2004). But its conclusion that HEC is a "necessary party" because it represents citizens who "truly do have concerns for their safety and the safety of their fellow citizens" is not the same as determining that HEC's members have standing in their own right under *Hunt*. (*See* App. Vol. II: 016, ¶¶ 54-55.) Nor does the trial court's conclusion that "there must be some stop gap entity/individual to be able to question such dangers before actual

harm (cancer or other impacts from dumping) is had" address any of the other required elements for demonstrating associational standing under *Hunt.* (*See* App. Vol. II: 016, ¶ 57.) So, although the trial court correctly set aside the ALJ's grant of summary judgment for AESI, it failed to make the findings and conclusions necessary to establish that HEC satisfied the *Hunt* test and is entitled to summary judgment on associational standing.

Compounding this omission, the trial court erroneously upheld the ALJ's denial of HEC's cross-motion for summary judgment on associational standing. That ruling violates Trial Rule 56(A) for the reasons discussed above. *Supra* at 45-60. It also creates further confusion about the effect of the court's ruling: did the trial court determine that HEC has associational standing as a matter of law or merely conclude that AESI was not entitled to summary judgment on that issue? HEC should not be required to relitigate its standing when the undisputed designated evidence establishes that it satisfies all three elements of the *Hunt* test. Accordingly, this Court should affirm the trial court's decision setting aside the ALJ's adverse standing determination, reverse the trial court's decision upholding the denial of HEC's cross-motion, and direct entry of summary judgment for HEC on the issue of associational standing.

## CONCLUSION

For the foregoing reasons, HEC respectfully requests that this Court reverse the trial court's judgment insofar as it upheld the ALJ's dispositive rulings on HEC's four CWA claims. Specifically, this Court should set aside the ALJ's dismissal of HEC's CCR Discharge and Antidegradation Claims under Trial Rule 12(B)(6), reverse the ALJ's grant of summary judgment for AESI and IDEM on HEC's Mercury and Cancer-Criteria Claims, and direct entry of summary judgment for HEC on those claims. This Court should also affirm the trial court's decision setting aside the ALJ's adverse associational-standing determination on proper legal grounds, reverse its

decision upholding the denial of HEC's Cross-Motion, and direct entry of summary judgment for HEC on associational standing.

Respectfully submitted,

*/s/Kim E. Ferraro*

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## APPEALED ORDER

In accordance with Appellate Rule 46(A)(12), a true and correct copy of the trial court's Order issued August 10, 2026, is attached hereto.

*/s/ Kim E. Ferraro*
Kim E. Ferraro

## WORD COUNT CERTIFICATE

Pursuant to Appellate Rule 44(F) and the Court's Order granting leave to file an oversized brief, I verify that this Appellant's Brief contains no more than 20,000 words, excluding items listed in Appellate Rule 44(C).

*/s/ Kim E. Ferraro*
Kim E. Ferraro

## CERTIFICATE OF SERVICE

I certify that on October 30, 2026, I electronically filed the foregoing using the Indiana E-Filing System (IEFS), and that the foregoing document was served upon the following counsel of record via IEFS.

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