INDIANA OFFICE OF ENVIRONMENTAL ADJUDICATION

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OBJECTION TO THE DENIAL OF THE ASH POND SYSTEM CLOSURE/POST-CLOSURE PLAN
SW PROGRAM ID 63-UP-09
HOOSIER ENERGY RURAL ELECTRIC COOPERATIVE INC. -
FRANK E. RATTS GENERATING STATION

2022 OEA 043

Official Short Cite Name:	HOOSIER ENERGY RURAL ELECTRIC COOPERATIVE
OEA Cause No.:	20-S-J-5129
Topics/Keywords:	Denial of Closure and Post-Closure Plans
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	Coal Ash Pond System
	Legacy Ponds
	329 IAC 10-9-1(b)
	IC § 13-14-9-8(a)(1)(A)(ii)
	IC § 13-14-9-8(h)(2)
	USWAG interpretation 901 F.3d 414 (D.C. Cir. 2018)
	Federal nullification/vacatur of regulation
	Rulemaking through interpretation
	Exceeding regulatory authority
	Cross Motions for Summary Judgment
	Request to Take Judicial Notice
	Bluebook signals
	Doctrine of ripeness
	Ind. R. Evid. 201
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Presiding ELJ:	LORI KYLE ENDRIS
Party Representatives:	KYLE BURNS, ESQ., IDEM
	MICHAEL T. SCANLON, ESQ., PETITIONER
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Index Category:	LAND QUALITY
Further Case Activity:	

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STATE OF INDIANA)
)
COUNTY OF MARION)
)
IN THE MATTER OF:)

BEFORE THE INDIANA OFFICE OF ENVIRONMENTAL ADJUDICATION

CAUSE NO. 20-S-J-5129

OBJECTION TO THE DENIAL OF
APPROVAL OF THE ASH POND SYSTEM
CLOSURE/POST-CLOSURE PLAN FOR
FRANK E. RATTS GENERATING STATION
SW PROGRAM ID 63-UP-09
HOOSIER ENERGY RURAL ELECTRIC COOPERATIVE INC.
PETERSBURG, PIKE COUNTY, INDIANA

Hoosier Energy Rural Electric Cooperative, Inc.
Petitioner,
v.
Indiana Department of Environmental Management,
Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

PLEASE SUBMIT ALL FILINGS TO THE COURT VIA EMAIL AT frontdesk@oea.IN.gov.

This matter comes before the Office of Environmental Adjudication ("OEA" or "Court") on the Motions for Summary Judgment filed by Petitioner Hoosier Energy Electric Cooperative, Inc. ("Hoosier Energy") and Respondent Indiana Department of Environmental Management ("IDEM") which pleadings are part of the Court's record. Having read and considered the petition, motions, briefs, responses, replies, the presiding Environmental Law Judge makes the following Findings of Fact, Conclusions of Law and enters the Final Order:

FINDINGS OF FACT

1. Hoosier Energy owned and operated the Frank E. Ratts Generating Station ("Ratts Generating Station") that burned coal to produce electricity for distribution. As a result of the coal combustion process, the Ratts Generating Station produced coal combustion residuals[1] ("CCR") which were mixed with water and channeled to wet surface impoundments or ash ponds.[2] CCR comprises "one of the largest industrial waste streams generated in the [United States]." 80 Fed. Reg. 21,302 (April 17, 2015). CCR consists of "contaminants of environmental concern," and contains carcinogens and neurotoxins, including arsenic, boron, cadmium, hexavalent chromium, lead, lithium, mercury, molybdenum, selenium and thallium."[3]

2. The Ratts Generating Station's Ash Pond System consists of inactive CCR surface impoundments[4] at an inactive facility. An "inactive CFR surface impoundment" or "legacy pond" is defined in 40 C.F.R. § 257.53 as legacy ponds that no longer receive CCR on or after October 19, 2015; still contain both CCR and liquids on or after October 19, 2015; and are located at a facility that has not generated electricity on or after October 19, 2015. *Id.* In March 2015, the Ratts Generating Station ceased generating electricity and sending CCR to the Ash Pond System 1, 4 South and 4 North.[5]

3. Congress enacted the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. §§ 6901-6987, "to establish a comprehensive federal program to regulate the handling of solid wastes." *Envtl. Def. Fund v. U.S. EPA,* 852 F.2d 1309, 1310 (D.C. Cir. 1988). To accomplish this objective, Congress authorized the Administrator of the EPA to "prescribe, in consultation with Federal, State, and regional authorities, such regulations as are necessary to carry out [the Administrator's] functions under this Act." RCRA required that "[e]ach regulation promulgated under this Act shall be reviewed and, where necessary, revised not less frequently than every three years." *Id.* § at 6912(b). RCRA also required the EPA, "[w]ithin one year of enactment of this section, and from time to time thereafter, . . . [to] develop and publish suggested guidelines for solid waste management." *Id.* at § 6907(a).

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[1] Coal combustion residuals or CCR is defined as "fly ash, bottom ash, boiler slag, and flue gas desulfurization materials generated from burning coal for the purpose of generating electricity by electric utilities and independent power producers." 40 C.F.R. § 257.53.

[2] The surface impoundments may be referred to as surface impoundments, ash ponds, legacy ponds, or Ash Pond System.

[3] *See* Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities, 75 Fed. Reg. 35,138, 35,218, 35, 53, and 35,168 (June 21, 2010). *See also,* 80 Fed. Reg. at 21,449.

[4] A CCR surface impoundment is defined as "a natural topographic depression, man-made excavation, or diked area, which is designed to hold an accumulation of CCR and liquids, and the unit treats, stores, or disposes of CCR." 40 C.F.R. § 257.2.

[5] The Ash Pond System originally consisted of five (5) surface impoundments: Ash Pond 1, 2, 3, 4 North and 4 South. Prior to Hoosier Energy's submission of its Proposed Closure and Post-Closure Plans to IDEM, two (2) of the surface impoundments, 2 and 3, were taken out of operation and ceased receiving CCR.

4. In response to a directive by a federal court to devise a schedule to comply with its statutory obligation under RCRA to regulate CCR,[6] EPA published two (2) alternative proposed rules to govern the disposal of CCR produced by electric utilities and independent power plants, one under Subtitle C (basing the rule on the toxicity of CCRs), *see* 75 Fed. Reg. at 35,146, and the other under Subtitle D (setting guidelines on where and how CCR disposal sites were to be built, maintained and monitored). 80 Fed. Reg at 21,319. On April 17, 2015, EPA published its final coal combustion residual rule ("CCR Rule")[7] under Subtitle D and set minimum criteria for the disposal of CCRs in landfills and surface impoundments. 80 Fed. Reg. 21,301. The CCR Rule went into effect on October 14, 2015. 40 C.F.R. §§ 257.50 et seq.

5. EPA's goal for the CCR Rule was to regulate the risk associated with leaks or spills from ash ponds. The CCR Rule required leaking, unlined coal ash impoundments to initiate closure and stop receiving waste.[8] 40 C.F.R. § 257.10(a)(1). New impoundments would have to have a composite liner. Existing unlined or clay-lined ponds could continue operation unless and until mandated to conduct continuous monitoring revealed leakage at which point the pond would have to be retrofitted with a composite liner or closed. *Id.* The CCR Rule provided an owner/operator six (6) months to initiate closing after the leak was detected. *Id.* EPA did not require groundwater monitoring to be installed or biannual sampling data to be evaluated at unlined impoundments until thirty (30) months after the CCR Rule was published. EPA specifically excluded legacy ponds from regulation. 40 C.F.R. § 257.50(e). Both environmentalists and industry groups sought judicial review of the CCR Rule and their petitions were consolidated into *Utility Solid Waste Activities Group v. EPA, No. 15-1219*, 901 F.3d 414 (D.C. Cir. 2018) (*"USWAG"*).

6. IDEM incorporated EPA's CCR Rule into its solid waste regulations at 329 I.A.C. 10-9-1(b) and (c) through a "section 8" rulemaking.[9] *See* Ind. Code § 13-14-9-8. A section 8 rulemaking expedites the promulgation of rules that incorporate by reference a federal law, regulation, or rule that contain no amendments that have a substantive effect on the scope or intended application of the federal law or rule. Ind. Code § 13-14-9-8(a)(1)(A)(ii).

7. When the Indiana Environmental Rules Board adopts a proposed rule under section 8 "and the federal law, rule, or regulation on which the adopted rule is based is later invalidated, vacated, or otherwise nullified by a judicial decree, order, or judgment of a state or federal court whose decisions concerning such matters have force and effect in Indiana [then]...that part of the rule that corresponds to the invalidated, vacated, or otherwise nullified federal law,

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[6] See *Appalachian Voices v. McCarthy,* 989 F. Supp.2d 30, 56 (D.D.C. 2013).

[7] OEA recognizes that the 2015 CCR Rule has been amended since the 2018 USWAG decision; notwithstanding, it is the Circuit Court's decision regarding the 2015 version of the CCR Rule that is at issue here and so will simply be referred to as CCR Rule throughout this decision.

[8] 40 C.F.R. § 257.101(a)(1).

[9] Ind. Reg. LSA Doc No. 16-217(F) (November 10, 2016); http://iac.iga.in.gov/iac//20161207-IR-329160217FRA.xml.html.

rule, or regulation is void as of the date that the judicial decree, order or judgment becomes final and unappealable." Ind. Code § 13-14-9-8(h)(2).

8. On January 31, 2018, Hoosier Energy submitted its Proposed Closure and Post-Closure Plans ("Closure Plan") for the Ash Pond System to IDEM.

9. On July 30, 2018, EPA finalized its first amendment to the CCR Rule ("2018 Amendment"). Under the 2018 Amendment, an unlined, leaking impoundment was required to initiate a closure process and stop receiving waste within six (6) months of leak detection or October 31, 2020, whichever was later.

10. On August 21, 2018, the D.C. Circuit Court issued its decision in *USWAG*. The Court found that "EPA acted arbitrarily and capriciously and contrary to RCRA in failing to require the closure of unlined surface impoundments, in classifying so-called 'clay-lined' impoundments as lined, and in exempting inactive surface impoundments at inactive power plants from regulation." *USWAG*, 901 F.3d 414, 449. The Court vacated and remanded "the provisions of the [CCR] Rule that permit unlined impoundments to continue receiving coal ash unless they leak, *see* [40 C.F.R] § 257.101(a), classify 'clay-lined' impoundments as lined, *see* 40 C.F.R. § 257.71(a)(1)(i), and exempt from regulation inactive impoundments at inactive facilities, *see* 40 C.F.R. § 257.50(e)." *Id.*

11. The portion of *USWAG* in dispute here is IDEM's interpretation of the Court's decision to vacate and remand the exemption in the CCR Rule for inactive impoundments at inactive facilities at 40 C.F.R. § 257.50(e).[10] At the time of the Court's decision, Hoosier Energy's legacy ponds at the former Ratts Generating Station were subject to the exclusion at 40 C.F.R. § 257.50(e).

12. On December 17, 2018, IDEM issued Hoosier Energy a Request for Additional Information ("Request") which stated, "[b]ased on [*USWAG*], the Ash Pond System is now subject to the requirements of 40 CFR 257, as adopted by reference into . . . 329 I.A.C. 10-9-1(b) and (c)" and "IDEM cannot approve a closure plan that would leave CCR in place without a description of how the plan controls, minimizes, or eliminates post-closure infiltration and releases 'to the maximum extent feasible.'" Request, p. 2.

13. On March 13, 2019, the D.C. Circuit Court remanded the 2018 Amendment, without vacatur, to EPA for revision consistent with its decision in *USWAG*. *Waterkeeper All., Inc. v. EPA*, No. 18-1289, 2019 U.S. App. LEXIS 7443 at 2 (D.C. Cir. 2019).

14. Hoosier Energy responded to IDEM's Request on August 19, 2019. On June 25, 2020, IDEM replied to Hoosier Energy's response and stated,

[10] 40 C.F.R. § 257.50(e) states, "This subpart does not apply to electric utilities or independent power producers that have ceased producing electricity prior to October 19, 2015."

> It is undisputed that Ash Ponds 1, 4 South and 4 North at Hoosier Energy's Ratts Generating Station are "inactive CCR surface impoundments," *see* 40 CFR 257.53, at an inactive facility, otherwise known as legacy ponds. . . . [T]he U.S. Court of Appeals for the D.C. Circuit ordered that the federal CCR [R]ule "be vacated and remanded with respect to the provisions that . . .exempt from regulation inactive impoundments at inactive facilities." [*USWAG* citation omitted]. . . The necessary consequence of this order is that the exemption for legacy ponds is struck from the federal CCR [R]ule. Pursuant to IC 13-14-9-8(h)(2)(B)(i), the exemption for legacy ponds is therefore also struck from IDEM's adoption of the federal CCR [R]ule, *see* 329 IAC 10-9-1(b) and (c).

IDEM June 25, 2020, Reply to Hoosier Energy's Response to IDEM August 19, 2019, Request.

15. On December 2, 2019, EPA again proposed changes to the CCR Rule and referred to it as "A Holistic Approach to Closure" Part A. 84 Fed. Reg. 65,941. This proposed rule required lined and unlined impoundments to close "as soon as technically feasible" regardless of whether they are leaking. *Id.* at 65,944. EPA determined that "as soon as technically feasible" meant August 31, 2020, which EPA determined was adequate time to acquire additional capacity to replace unlined impoundments. *Id.* at 65, 946. To comply with *USWAG*, clay-lined impoundments were to be treated the same as unlined impoundments and required to be closed by August 31, 2020. *Id.* at 65,944. Notwithstanding, this proposed rule allowed for a three (3) month extension that was "self-implementing" or automatically available to facilities thereby delaying the deadline to initiate closure of unlined coal ash impoundments until November 30, 2020. *Id.* at 65,953. Part A became effective September 28, 2020. 85 Fed. Reg. 53516. Environmental groups challenged Part A under *Labadie Environmental Organization v. EPA* which, as of the date of this Order, is still pending in the D.C. Circuit Court.[11]

16. On March 3, 2020, EPA proposed Part B of its Holistic Approach to Closure that established procedures for impoundments to continue to operate by making alternate liner demonstrations. Part B allows for the use of CCR during closure, adds an additional option for units being closed by removal of CCR, and requires the submittal of annual progress reports. *See* 85 Fed Reg. 72,506 (November 12, 2020). Part B became effective December 14, 2020.

17. In its October 2020 Advanced Notice of Proposed Rulemaking, 85 Fed. Reg. 65015 (October 10, 2020), EPA sought "public input on key issues at this preliminary stage to inform [EPA's] thinking on any future proposed rulemaking" to address legacy ponds. *Id.* at 65016. Once promulgated, the rule will represent the first time that legacy ponds will be regulated.

18. On December 17, 2020, IDEM issued its Letter Denying Approval of the Closure Plans ("Denial"). IDEM denied approval because the "Plan does not comply with 329 Ind. Admin.

[11] This petition for review is dated more than ninety (90) days after EPA promulgated Part B which raises the question whether it is within the D.C. Circuit Court's jurisdiction to hear the case. *See* 42 U.S.C. § 6976(a)(1).

Code 10-9-1(c) which requires the closure and post closures plans for Ash Ponds 1, 4 South and 4 North to comply with the federal CCR rule sans the vacated exemption for legacy ponds. For this reason, IDEM is hereby denying approval of the [Closure] Plan pursuant to 329 I.A.C. 10-9-1(c)." Denial, p. 1.

19. On December 29, 2020, Hoosier Energy filed its Petition for Adjudicatory Hearing and Administrative Review of IDEM's Denial.

20. On January 5, 2021, OEA issued an Order Scheduling Prehearing Conference scheduled for January 26, 2021.

21. On August 23, 2021, both Hoosier Energy and IDEM submitted Motions for Summary Judgment. Hoosier Energy raised two (2) issues which are restated as follows: Whether IDEM exceeded its authority by expanding the scope and requirements of the CCR Rule to include the regulation of legacy ponds; (2) Whether IDEM has the statutory authority to void and/or rewrite 40 C.F.R. § 257.50(c) in 329 I.A.C. 10-9-1(b) and (c) through an Ind. Code § 13-14-9-8 rulemaking; (3) Whether the CCR Rule applies to Hoosier Energy's Ash Pond System; and (4) Whether IDEM exceeded its authority in the interpretation of the term "infiltration" as including subsurface groundwater movement. Hoosier Energy Motion for Summary Judgment, p. 1.

In its Motion for Summary Judgment, IDEM averred there is no genuine issue of material fact, and it is entitled to judgment as a matter of law. IDEM Motion for Summary Judgment, p. 1.

22. On September 22, 2021, both parties filed Responses to each other's Motions for Summary Judgment.

23. On October 7, 2021, both parties filed Replies to each other's Responses. IDEM additionally filed a Supplemental Designation of Exhibits in Support of its Reply Brief.[12]

24. On January 13, 2022, IDEM filed a Request to Take Judicial Notice of EPA's interpretation of "'infiltration' for purposes of the closure performance standard at 40 C.F.R. § 257.120(d)." On January 18, 2022, Hoosier Energy filed its Response, and on January 20, 2022, OEA denied IDEM's Request.

[12] It is unclear why IDEM filed a Supplemental Designation of Exhibits in Support of its Reply Brief as it made no reference to these Exhibits in its Reply Brief.

CONCLUSIONS OF LAW

1. IDEM is authorized to implement and enforce Indiana environmental statutes and rules promulgated relevant to those statutes. *See* Ind. Code § 13-13 *et seq.* and Ind. Code § 13-14-1-11.5. OEA has jurisdiction over the decisions of the Commissioner of the IDEM and the parties to the controversy pursuant to Ind. Code § 4-21.5-7-3. In the exercise of its jurisdiction, OEA is governed by the Administrative Orders and Procedures Act ("AOPA") per Ind. Code § 4-21.5 et seq. and OEA-specific rules per 315 I.A.C. 1, et seq.

2. This is an Order issued pursuant to Ind. Code § 4-21.5-3-23. Findings of Fact that may be construed as Conclusions of Law and Conclusions of Law that may be construed as Findings of Fact are so deemed.

3. The OEA must apply a *de novo* standard of review to this proceeding when determining the facts at issue. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.,* 615 N.E.2d 100 (Ind. 1993). Findings of fact must be based exclusively on the evidence presented to the ELJ, and deference to the agency's initial factual determination is not allowed. *Id.*; Ind. Code § 4-21.5-3-27(d). OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Envtl. Adjud.,* 811 N.E.2d 806 (Ind. 2004).

4. The OEA considers a motion for summary judgment "as would a court that is considering a motion for summary judgment filed under Ind. Trial Rule 56." Ind. Code § 4-21.5-3-23(b). Citing Ind. Tr. R. 56(C), the Indiana Supreme Court stated, "[d]rawing all reasonable inference in favor of...the non-moving parties, summary judgment is appropriate 'if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" *Hughley v. State,* 15 N.E.3d 1000, 1003 (Ind. 2014). "A fact is 'material' if its resolution would affect the outcome of the case, and an issue is 'genuine' if a trier of fact is required to resolve the parties' differing accounts of the truth, or if the undisputed material facts support conflicting reasonable inferences." *Id.* It is well settled in Indiana that "mere speculation cannot create questions of fact" sufficient to defeat summary judgment. *Beauty v. LaFountaine,* 896 N.E.2d 16, 20 (Ind. Ct. App. 2008).

5. The moving party bears the initial burden of establishing the absence of any genuine issue of material fact. *Hughley,* 15 N.E.3d at 1003. Once established, the burden shifts to the non-moving party to "'come forward with contrary evidence' showing an issue for the trier of fact." *Id.* "[A]ll rational assertions of fact and reasonable inferences ...are deemed to be true and are viewed in the nonmovant's favor." *Lindsey v. DeGroot,* 898 N.E.2d 1251, 1256 (Ind. Ct. App. 2009). Summary judgment is particularly appropriate where the relevant facts are undisputed and pure legal questions of statutory interpretation are presented. *Kluger v. J.J.P Enterprises, Inc.,* 159 N.E.3d 82, 87 (Ind. Ct. App. 2020).

Whether IDEM exceeded its authority by expanding the scope and requirements of the CCR Rule to include the regulation of legacy ponds:

6. EPA's CCR Rule went into effect on October 19, 2015. 40 C.F.R. § 257.51. On June 14, 2016, environmental and industry groups sought judicial review[13] of EPA's CCR Rule, and the petitions were consolidated into *USWAG*, 901 F.3d 414.

7. On November 14, 2016, IDEM incorporated EPA's CCR Rule into its solid waste regulations at 329 I.A.C. 10-9-1(b) and (c). Ind. Reg. LSA Doc No. 16-217(F).[14] The incorporation by reference was accomplished through a "section 8" rulemaking under Ind. Code § 13-14-9-8(a)(1)(ii).

8. When the Indiana Environmental Rules Board adopts a proposed rule under section 8 "and the federal law, rule, or regulation on which the adopted rule is based is later invalidated, vacated, or otherwise nullified by a judicial decree, order, or judgment of a state or federal court whose decisions concerning such matters have force and effect in Indiana [then]. . . that part of the rule that corresponds to the invalidated, vacated, or otherwise nullified federal law, rule, or regulation is void as of the date that the judicial decree, order or judgment becomes final and unappealable." Ind. Code § 13-14-9-8(h).

9. On August 21, 2018, the D.C. Circuit Court issued its decision in *USWAG*. The Court found that "EPA acted arbitrarily and capriciously and contrary to RCRA in failing to require the closure of unlined surface impoundments, in classifying so-called 'clay-lined' impoundments as lined, and in exempting inactive surface impoundments at inactive power plants from regulation." *USWAG* at 449. The Court vacated and remanded "the provisions of the [CCR] Rule that permit unlined impoundments to continue receiving coal ash unless they leak, *see* [40 C.F.R] § 257.101(a), classify 'clay-lined' impoundments as lined, *see* 40 C.F.R. § 257.71(a)(1)(i), and exempt from regulation inactive impoundments at inactive facilities, *see* 40 C.F.R. § 257.50(e).[15] *USWAG* at 449.

When the Court in *USWAG* vacated[16] and remanded the three (3) provisions of the CCR Rule, it nullified EPA's agency action --- its rulemaking --- as it pertains to those provisions. "When a court vacates an agency's rules, the vacatur restores the status quo before the invalid rule took effect and the agency must 'initiate another rulemaking proceeding if it would seek to

[13] The Administrative Procedures Act, 5 USC § 701 – 706, authorizes reviewing courts to review administrative agency decisions. Courts are not authorized through decision-making, to promulgate rules. 5 USC § 55 et seq. (1946).

[14] *See also* http://iac.iga.in.gov/iac//20161207-IR-329160217FRA.xml.html.

[15] Subpart (e) reads, "[t]his subpart does not apply to electric utilities or independent power producers that have ceased producing electricity prior to October 19, 2015."

[16] *See Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 797 (D.C. Cir. 1983) ("To vacate. . .means to annul; to cancel or rescind; to declare, to make, or to render, void; to defeat; to deprive of force; to make of no authority or validity; to set aside").

confront the problem anew.'" *Envtl. Def. v. Leavitt*, 329 F. Supp. 2d 55, 64 (D.D.C. 2004) (citing *Indep. U.S. Tanker Owners Comm. v. Dole,* 809 F.2d 847, 854 (D.C. Cir. 1987); *Sugar Cane Growers Co-op. of Florida v. Veneman,* 289 F.3d 89, 97 (D.C. Cir. 2002)).

Following the Court's vacatur and remand of 40 C.F.R. § 257.50(e), the CCR Rule no longer addressed "electric utilities or independent power producers that have ceased producing electricity prior to October 19, 2015." What the Court's vacatur and remand of 40 C.F.R. § 257.50(e), did not do was create a new rule to regulate inactive impoundments at inactive facilities as only federal agencies have the authority to create federal rules. 5 U.S.C § 553. To be able to regulate electric utilities that have ceased producing electricity prior to October 19, 2015, EPA has to promulgate a new rule. *Motor Vehicle Mfrs. Ass'n v. State Farm Auto. Ins. Co.,* 463 U.S. 29, 34 (1983).

10. IDEM interpreted the Court's vacatur and remand in *USWAG* to include vacatur and remand of 40 C.F.R. § 257.50(c),[17] which applies to "inactive CCR surface impoundments at *active* electric utilities or independent power producers" (emphasis added). IDEM also interpreted *USWAG* to change the language of 40 C.F.R. § 257.50(c) to read inactive CCR surface impoundments at *inactive* utilities or independent power producers (emphasis added). Based upon its interpretation of *USWAG*, IDEM denied Hoosier Energy's Proposed Closure and Post-Closure Plans. IDEM's December 17, 2020, Denial reads in part:

> As IDEM has previously explained [in its June 25, 2020, letter[18] to Hoosier Energy], "...the [Closure] Plan does not satisfy 329 IAC 10-9-1(c), which requires the closure and post-closure plans for Ash Ponds 1, 4 South and 4 North to comply with the federal CCR [R]ule, sans the vacated exemption for legacy ponds. For this reason, IDEM is hereby denying approval of the [Closure] Plan pursuant to 329 IAC 10-9-2(c)."

Denial, p. 1.

11. IDEM contends that because "[t]he D.C. Circuit's opinion [in *USWAG*] *plainly and explicitly vacated* the legacy pond exemption in all its forms, . . . IDEM correctly applied the federal CCR Rule in denying approval of [Hoosier Energy's] Plan" (emphasis added). IDEM Memorandum in Support of its Motion for Summary Judgment, p. 5. Notwithstanding the Court having not cited 40 C.F.R. § 257.50(c) in its vacatur and remand, IDEM argues that *USWAG* "cannot be read to vacate only the language at 40 C.F.R. § 257.50(e)." *Id.* Hoosier Energy contends that the *USWAG* decision eliminated the exclusion for legacy ponds in 40 C.F.R. § 257.50(e) but did not revise 40 C.F.R. § 257.50(c).

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[17] 40 C.F.R. § 257.50(c) states, "For a coal combustion residuals impoundment subject to 40 CFR 257, Subpart D, final disposal of solid waste in the impoundment at the end of the operation of the impoundment is subject to approval by the commissioner based on the requirements for coal combustion residuals impoundments in 40 CFR 257.50 through 40 CFR 257.107 and on other management practices that are protective of human health and the environment."

[18] VFC #82996037.

"Plain" is defined as "[t]he obvious meaning, intent, or implication of any clause/statement or any legal paper, which can be understood by just reading it." Plain. Black's Law Dictionary (11th ed. 2019). "Explicit" is defined as "not obscure or ambiguous, having no disguised meaning or reservation; [c]lear in understanding. *Id.* at Explicit. For the legacy pond exemption to be plainly and explicitly vacated, the Court would have had to include 40 C.F.R. § 257.50(c) in its vacatur and remand; it did not.

12. IDEM posits that "*USWAG* cannot be read to vacate only the language at 40 CFR § 257.50(e) which reads, 'This subpart does not apply to electric utilities or independent power producers that have ceased producing electricity prior to October 19, 2015.'" IDEM also posits, "in vacating the legacy pond exemption, the Court addresses impoundments. . .and the facilities where they are located. Subsection 257.50(e) however, is phrased in terms of 'utilities' and 'power producers.' . . .The holding's careful language highlights the Court's intent to broadly strike all language exempting legacy ponds." IDEM Memorandum in Support of its Motion for Summary Judgment, p. 5.

It is unclear why IDEM would claim that the Court in *USWAG* intended to vacate and remand subpart (c) by vacating and remanding subpart (e). In addressing EPA's legacy pond exemption, the Court in *USWAG*, held that the exclusion for inactive impoundments at inactive facilities (legacy ponds) at 40 C.F.R. § 257.50(e) was vacated and remanded to EPA but neither stated nor implied that vacating and remanding 40 C.F.R. § 257.50(e) included or resulted in changes to 40 C.F.R. § 257.50(c). Without the Court's specific inclusion of 40 C.F.R. § 257.50(c), IDEM's position, "[t]he holding's careful language highlights the Court's intent to broadly strike all language exempting legacy ponds," is unsupported by the Court's own words. Had the Court intended to include 40 C.F.R. § 257.50(c) in its vacatur and remand, it would have done so.

Moreover, subpart (c) "applies to *inactive* CCR surface impoundments at *active* electric utilities or independent power producers, regardless of the fuel currently used at the facility to produce electricity" (emphasis added). Ratts Generating Station's legacy ponds are *inactive* CCR surface impoundments at an *inactive* facility[19] (emphasis added). It is unclear why IDEM would claim that by vacating and remanding subpart (e), subpart (c) "provides a clear regulatory hook for Hoosier Energy's legacy ponds"[20] when legacy ponds, by definition, are not located at an active facility.

13. IDEM contends that "[i]n vacating all iterations of the legacy pond exemption, the Court explicitly refers to "the provisions of the Final Rule that...exempt from regulation inactive impoundments at inactive facilities, **see** 40 C.F.R. § 257.50(e)" (emphasis original). IDEM Memorandum in Support of its Motion for Summary Judgment, pp. 5 - 6.

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[19] The definition of "inactive CFR surface impoundment" is defined at 40 C.F.R. § 257.53 as legacy ponds that no longer received CCR on or after October 19, 2015; still contained both CCR and liquids on or after October 19, 2015; and are located at a facility that has not generated electricity on or after October 19, 2015.

[20] IDEM Memorandum in Support of its Motion for Summary Judgment, p. 6.

The plural form of the word "provision" used in the paragraph vacating and remanding 40 C.F.R. § 257.50(e) is accompanied by two (2) other provisions appearing before the vacatur and remand of 40 C.F.R. § 257.50(e), namely those "that permit unlined impoundments to continue receiving coal ash unless they leak, *see* [40 C.F.R.] § 257.101(a)" [and that] classify "clay-lined" impoundments as lined, see 40 C.F.R. § 257.71(a)(1)(i)." *USWAG* at 449. Any other conclusion as to the Court's use of "provisions" defies logic.

14. IDEM contends that

> The Court uses the signal *'see'* to indicate § 257.50(e) represents an example of exemption language as opposed to embodying the exemption fully. The *see* signal prevented the need...to list out all rule provisions that effectuate the exemption and enhances the breadth with which the Court intended to rule on the issue. If the Court wished to limit its vacatur to the language in subsection (e), [it] could have done so, and it would not have used the signal before its citation (emphasis original).

IDEM Memorandum in Support of its Motion for Summary Judgment, p. 6.

With respect to the signal "see", Rule 1.2 of *The Bluebook: A Uniform System of Citation,* (Columbia L. Rev. Ass'n et al. eds., 21st ed. 2020) states, "See: Cited authority clearly supports the proposition. 'See' is used instead of '[no signal]' when the proposition is not directly stated by the cited authority but obviously follows from it; there is an inferential step between the authority cited and the proposition it supports." With respect to "[no signal]" *The Bluebook* states, "[no signal]: Cited authority (i) directly states the proposition, (ii) identifies the source of a quotation, *or* (iii) identifies an authority referred to in the text. *Use no signal...when directly quoting an authority* or when restating numerical data from an authority" (emphasis added). *Id.*

Throughout *USWAG,* the Court used the words "inactive impoundments at inactive facilities" and "legacy ponds" to describe "electric utilities or independent power producers that have ceased producing electricity prior to October 19, 2015." *See e.g., USWAG* at 422, 425, 432 – 434, and 449. The Court used the signal *"see"* because 40 C.F.R. § 257.50(e) does not directly use the words "inactive impoundments at inactive facilities" but appropriately signals the Court's vacatur and remand of 40 C.F.R. § 257.50(e). Thus, its use of *"see"* complied with standard citation practice and did not represent "an example of exemption language as opposed to embodying the exemption fully."

15. IDEM exceeded its authority by expanding the scope and requirements of the CCR Rule that was incorporated by reference into 329 IAC 10-9-1(b) and (c) to include the regulation of legacy ponds. There is no genuine issue of material fact, and summary judgment in Hoosier Energy's favor is appropriate.

Whether IDEM has the statutory authority to void or rewrite 40 C.F.R. § 257.50(c) incorporated in 329 I.A.C. 10-9-1(b) and (c) through an Ind. Code § 13-14-9-8 rulemaking:

16. IDEM's incorporation by reference of 40 C.F.R. § 257.50 et seq. was accomplished through a "section 8" rulemaking under Ind. Code § 13-14-9-8 when it "incorporat[ed] by reference a federal law, regulation, or rule that. . .contain[ed] no amendments that have a substantive effect on the scope or intended application of the federal law or rule." Ind. Code § 13-14-9-8(a)(1)(A)(ii).

Ind. Code § 13-14-9-8(h)(2)(B)(i) automatically voids the part(s) of a federal rule that corresponds to the part(s) invalidated and vacated by judicial decree or judgment. The *USWAG* Court's vacatur and remand of 40 C.F.R. § 257.101(a), 40 C.F.R. § 257.71(a)(1)(i), and 40 C.F.R. § 257.50(e) automatically voided these parts of the CCR Rule incorporated into 329 I.A.C. 10-9-1.[21] Because 40 C.F.R. § 257.50(c) was not invalidated or vacated, it is still incorporated by reference as it appeared when IDEM completed its Section 8 rulemaking in 2016.

17. IDEM contends that "[b]ecause IDEM is required by statute to give effect to *USWAG's* vacatur, doing so does not constitute a rulemaking or rule amendment that supersedes IDEM's authority." IDEM Response to Petitioner's Motion for Summary Judgment, p. 3. IDEM employed its interpretation of the effect of *USWAG's* vacatur of 40 C.F.R. § 257.50(e) to 40 C.F.R. § 257.50(c) as follows:

> . . .[T]hat as a necessary consequence of. . .*USWAG*, the phrase "at active electric utilities or [sic] independent power producers, regardless of the fuel currently used at the facility to produce electricity" has been struck from IDEM's incorporation of 40 CFR 257.50(c) at 329 I.A.C. 10-9-1(b) and (c).

IDEM's Response to Hoosier Energy's Request for Admission no. 6, pp. 3 - 4. IDEM cites no legal authority that the remanded and vacated 40 C.F.R. § 257.50(e) either applied to 40 C.F.R. § 257.50(c) or authorized IDEM to strike and amend the language in 40 C.F.R. § 257.50(c) to apply to legacy ponds. The Court in *USWAG* neither vacated nor altered the language of 40 C.F.R. § 257.50(c). 40 C.F.R. § 257.50(c), as incorporated into 329 I.A.C. 10-9-1(b) and (c), remains incorporated by reference as it appeared in the original CCR Rule.

IDEM's application of 40 C.F.R. § 257.50(c) to legacy ponds represents a "substantive effect on the scope or intended application of the federal law or rule" which does not comply with Ind. Code § 13-14-9-8(a)(1)(A)(ii). With respect to extending the interpretation of a rule, our Supreme Court has held:

> [R]ights created or benefits conferred by an administrative rule should not be extended by interpretation beyond the plain terms of the rule itself . . . .To do so

[21] Ind. Code § 13-14-9-8(h)(2)(B)(i).

> would be to create rules by interpretation, thus defeating the legislative requirement that rules may be adopted only by compliance with required formalities such as publication of notice and a hearing and the approval of the attorney general and governor.

Miller Brewing Co. v. Bartholomew County Bev. Co., 674 N.E.2d 193, 202 (Ind. Ct. App. 1996) (citing *State ex rel. Blair v. Gettinger*, 105 N.E.22d 161, 168) (Ind. 1952). *See also Lee Alan Bryant Health Care Facilities v. Hamilton*, 788 N.E.2d 495, 500 (Ind. Ct. App.) (An agency. . .may not by its rules and regulations add to or detract from the law as enacted, nor may it by rule extend its powers beyond those conferred upon it by law).

18. Here, striking and amending language that differs from the CCR Rule represents a "substantive effect on the scope or intended application of the federal law or rule" and "creates [a] rule[] by interpretation." To make the changes IDEM has made to 329 I.A.C. 10-9-1(b) and (c) requires formal rulemaking.[22] There is no genuine issue of material fact, and summary judgment in Hoosier Energy's favor is appropriate.

Whether the CCR Rule applies to Hoosier Energy's Ash Pond System:

19. Hoosier Energy contends that IDEM erred in denying its Closure Plan because it did "not satisfy 329 IAC 10-9-1(c) which requires the closure and post-closure plans for Ash Ponds 1, 4 South and 4 North to comply with the federal CCR [Rule]." Denial, p. 1.

20. Before the question of whether Hoosier Energy's Ash Pond System is still subject to the CCR Rule following the vacatur and remand of 40 C.F.R. § 257.50(e), it must first be determined what facilities remain subject to regulation under the CCR Rule. 40 C.F.R. § 257.50, Scope and Purpose states in relevant part:

> . . .
>
> (b) This subpart applies to owners and operators of new and existing landfills and surface impoundments, including any lateral expansions of such units that dispose or otherwise engage in solid waste management of CCR generated from the combustion of coal at electric utilities and independent power producers. Unless otherwise provided in this subpart, these requirements also apply to disposal units located off-site of the electric utility or independent power producer. This subpart also applies to any practice that does not meet the definition of a beneficial use of CCR.
>
> (c) This subpart also applies to inactive CCR surface impoundments at active electric utilities or independent power producers, regardless of the fuel currently used at the facility to produce electricity.

[22]Ind. Codes §§ 4-22-2 et seq. and 13-14-9-1(b) (In addition to the requirements of IC 4-22-2 and IC 13-14-8, a board may not adopt a rule except in accordance with this chapter).

. . .

21. In its Response to Hoosier Energy's Request for Admission no. 6, pp. 3 – 4, IDEM stated:

> IDEM admits that the Ash Pond System does not include a 'new CCR surface impoundment,' a 'lateral expansion' of a 'new CCR surface impoundment,' an 'existing CCR surface impoundment' or any 'lateral expansion' of an 'existing CCR surface impoundment,' or any 'inactive CCR surface impoundments' at an 'active electric utilit[y]' or 'independent power producer[]' as those terms are defined in 40 CFR 257.53.

22. Following the Court's decision in USWAG, the types of surface impoundments still subject to the CCR Rule, 40 C.F.R. § 257.50(b) and (c), are limited to the types identified by IDEM as not including Hoosier Energy's Ash Pond System. Due to the Court's vacatur of 40 C.F.R. § 257.50(e), the CCR Rule does not apply to legacy ponds and thus Hoosier Energy's Ash Pond System. Therefore, IDEM acted arbitrarily and capriciously in applying the CCR Rule to Hoosier Energy's legacy ponds and denying its Closure Plan. There is no genuine issue of material fact here, and summary judgment in Hoosier Energy's favor is appropriate.

Whether IDEM exceeded its authority in its interpretation of the term "infiltration" as including subsurface groundwater movement:

23. IDEM contends that Hoosier Energy's Closure Plan failed to meet the closure performance standard under 40 C.F.R. § 257.102(d)(1).

24. IDEM's denial of Hoosier Energy's Closure Plan by application of a closure performance standard under 40 C.F.R. § 257.102(d)(i) is not appropriate when the CCR Rule does not apply to Hoosier Energy's Ash Pond System.

25. A claim must be ripe before it can be reviewed. *Garau Germano, P.C. v. Robertson,* 133 N.E.3d 161, 167 (Ind. Ct. App. 2019), *trans. denied.* "Ripeness" is defined as the "circumstance existing when a case has reached, but has not passed, the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made." Ripeness, Black's Law Dictionary 725 (11th ed. 2019). The Court in *Garau Germano* stated:

> Ripeness relates to the degree to which the defined issues in a case are based on actual facts rather than on abstract possibilities. . . . *Carroll Cty. Rural Elec. Memb. Corp. v. Ind. Dep't of Rev.,* 733 N.E.2d 44, 47 (Ind. Tax Ct. 2000) (citing *Ind. Dep't of Envtl. Mgmt. v. Chem. Waste Mgmt.,* 643 N.E.2d 331, 336 (Ind. 1994)). The basic rationale behind our ripeness doctrine is 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.' *Ind. Gas Co. v. Ind. Fin. Auth.,* 977 N.E.2d 981, 989-90

(Ind. Ct. App. 2012), *trans. granted, summarily aff'd in relevant part*, 999 N.E.2d 63 (Ind. 2013) (quoting *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 732-33, (1998)). A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.' *Ind. Gas Co.* at 989 - 90 (quoting *Texas v. United States*, 523 U.S. 296, 300, (1998)).

Id.

26. Because the CCR Rule does not apply to Hoosier Energy's Ash Pond System, the issue of whether IDEM exceeded its statutory authority in its interpretation of the term "infiltration" as including subsurface groundwater movement is not ripe for review.

FINAL ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Hoosier Energy's Motion for Summary Judgment is hereby **GRANTED.** IDEM's Motion for Summary Judgment is hereby **DENIED.**

You are further notified that pursuant to provisions of I.C. § 4-21.5-7-5, the Office of Environmental Adjudication serves as the ultimate authority in administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is a Final Order subject to Judicial Review consistent with applicable provisions of I.C. § 4-21.5. Pursuant to I.C. § 4-21.5-5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

IT IS SO ORDERED this 27th day of January, 2022 in Indianapolis, IN.

Hon. Lori Kyle Endris
Environmental Law Judge
frontdesk@oea.IN.gov

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