

**COMMISSIONER, INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT  
CASE NO. 2018-25885-S (RE: LEACHATE) AND CASE NO. 2019-26080-S (RE: EROSION)  
HOOSIER ENERGY RURAL ELECTRIC COOPERATIVE, INC., SULLIVAN COUNTY  
2022 OEA 067, CAUSE NO. 20-S-E-5121**

<b>Official Short Cite Name:</b>	<b>Hoosier Energy 2022 OEA 067</b>
<b>OEA Cause No.:</b>	20-S-E-5121
<b>Topics/Keywords:</b>	Restricted waste site Landfill EPA Solid Waste Permit IDEM Type-I Solid Waste Permit IDEM Type-II Solid Waste Permit Infrastructure Leachate Seepage Perimeter ditch system 50 feet outside of the solid waste boundary NPDES permit outfall Seep management plan Sedimentation pond Unlined French drain Toe drain Mercury, arsenic, chloride, sulphate, total dissolved solids Erosion rill Abnormal rainfall event Clogged drop inlet Notice of Violation Commissioner’s Order Civil penalty policy, ID No. Enforcement 99-0002-NPD Ind. Code § 4-21.5-2-5(8) I.C. § 4-21.5-3-27 I.C. § 13-14-1-11.5 I.C. § 13-30-3-4(b)(2) I.C. § 13-30-3-9 315 IAC 1-2-1(10) 329 IAC 10-28-11(b) 329 IAC 10-28-14(a) 329 IAC 10-28-15(a), (b) 329 IAC 10-30-2, 329 IAC 10-30-3

<b>Presiding ELJ:</b>	MARY DAVIDSEN, ESQ.
<b>Party Representatives:</b>	JULIE LANG, ESQ., IDEM
	APRIL D. LASHBROOK, ESQ., IDEM
	AMY E. ROMIG, ESQ., RESPONDENT
	CHRISTOPHER E. KOZAK, ESQ., RESPONDENT
	MICHAEL T. SCANLON, ESQ., RESPONDENT
<b>Order Issued:</b>	JUNE 16, 2022
<b>Index Category:</b>	ENFORCEMENT
<b>Further Case Activity:</b>	



2. The Site is permitted under United States Environmental Protection Agency (“EPA) ID No. 000715284, IDEM Type-II Solid Waste Permit No. 77-03 (“Permit”)(issued on Jan. 12, 2018 for Area 1, 2A and 2B, *Ex. 6, (VFC # 80592965)*), and IDEM Type-I Solid Waste Permit No. 77-04 (issued on Aug. 19, 2016 for Area 3, VFC # 80339461). *Ex. 24, p. 2, ¶ 2.*

3. The Site is not otherwise serviced by infrastructure such as electrical service. *Tr. 158.* The Site’s stormwater management ditches in controversy here function by a gravity-fed system. The Site is serviced by dirt roads, which cannot bear tanker trucks, and are not able to bear four-wheel drive trucks many times of the year. *Tr. 157.*

#### Area 2A leachate

4. Area 2 is divided in to two areas, Area 2A, and Area 2B. *Tr. 36, 37, referencing Demonstrative Ex. 1; Tr. 108 – 110. Demonstrative Ex. 1.* Areas 2A and 2B are each surrounded by a perimeter ditch system. *Id.* The perimeter ditch systems are unlined, *Ex. 11, p. 2; Tr. p. 67,* and closely approximate each Area’s solid waste boundaries. *Tr. 35 -36.* These perimeter ditch systems are designed to collect and direct stormwater runoff. *Ex. 11, p. 2 (Hoosier Energy’s Nov. 1, 2018 response to IDEM letters addressing Inspection and violation).* Area 2A’s perimeter ditch system intercepts Area 2B’s perimeter ditch system. *Tr. 36 – 37, 108-110.* The liquid from Areas 2A and 2B then discharges into a sedimentation basin on the west side of Area 2B. *Id.*

“The NPDES permit outfall is 0035 for Area 2A and 2B landfill. From the landfill the storm water and leachate run into the sedimentation basin . . . [f]rom there the water flows under the plant road in the concrete ditch to a catch basin. The overflow of that basin goes into the lake. It is monitored at the overflow discharge point.”

*Ex. 4 (Oct. 23, 2017 email from Hoosier Energy’s Bayless to IDEM’s McClure, Snellenberger).*

5. Per 329 IAC 10-2-103, leachate is defined as

“a liquid that has passed through or emerged from solid waste and contains soluble, suspended, immiscible, or miscible material removed from such waste”.

IDEM’s Office of Land Quality, Industrial Waste Section Senior Environmental Manager Lori Freeman (Site inspector starting in Feb., 2018, *Tr. p. 32*) characterized Site non-stormwater liquid discharge as leachate because

“the facility representative referred to it as leachate, there was a precipitate, an odor and a color not typical of water going through just soil, and those are all factors”.

*Tr. 104, 105.*

In communications with IDEM, Hoosier Energy’s Environmental Team Leader Lon Petts used the term “leachate” as a general engineering term, referring to anytime water has leached

materials out of any substrate, from water drained from spaghetti to water drained through soil, but not strictly as applied to solid waste. *Tr. 190, 191.*

6. IDEM inspections on June 15, 2017 and on Aug. 16, 2017 noted moisture present in the ditches surrounding Area 2A, but not in other Areas. *Ex. 1, p. 4 (July 24, 2017); Ex. 2, p.3 (Aug. 28, 2017).* IDEM requested monitoring to determine the source. *Id.*

7. Per IDEM's Oct. 4, 2017 inspection, "the drainage ditch around the entire perimeter of Area 2A is carrying water . . . In some areas, moisture appears to be seeping from the toe of the slope. The seepage is discolored in some areas." *Ex. 5, p. 3 (Nov. 1, 2017).* In response to IDEM's request to identify the moisture's constituents, Hoosier Energy's Petts describes the moisture as clear leachate that, when exposed to air,

"there are constituents in the leachate that are precipitating out, forming those solids, causing the discoloration. That is, I don't believe that solids are simply being carried by the leachate to the surface. We can sample the solids to determine exactly what it is. But I think that being as white as they are is an indication of being a more pure crystal that what would be in FGD (Flue Gas Desulphurization) or ash waste."

*Ex. 5 at 3; Attachment C (Oct. 10 – 12, 2017 emails).* In response, IDEM did not cite a violation, but did request submission of a seep management plan within thirty days of Hoosier Energy's receipt of the Nov. 1, 2017 inspection report. *Ex. 5, p. 5.* IDEM Senior Environmental Manager Lori Freeman (Site inspector starting in Feb., 2018, *Tr. p. 32*) did not recall receiving a seep management plan. *Tr. p. 58.* However, IDEM issued a permit renewal which addressed seep management. *Ex. 6, Sec. G.*

8. On January 12, 2018, IDEM issued permit renewal 77-03, addressing management of Area 2A's seepage in a new Section G. *Ex. 6, Sec. G, p. 16.* Thomas Kreke was IDEM's permit writer. *Tr. 161 – 162.* Section G specifically required Hoosier Energy to submit a map and photographic documentation of the location and general condition of outlets and cleanout rinsers for the subdrainage system in Area 2A; repair and/or remove any clogging for the subdrainage system; and manage the seep as leachate until the leachate is determined to be free from contaminants and to meet the groundwater protection standards set forth in Sec. G. *Ex. 6; see Sec. G, p. 16.*

9. Unlike the Site's Area 3, Area 2A does not have a dedicated leachate collection system, nor does Area 2A's discharge go to an outfall where leachate is the only flow. *Ex. 6.*

10. Hoosier Energy's Permit 77-03 does not authorize Area 2A leachate to flow through the perimeter ditches to the sediment pond. *Id.* Nor did IDEM permit writer Kreke inform Hoosier Energy's Petts or convey such authority in the Jan. 11, 2018 email between them. *Ex. 43.* Instead, the email conveys IDEM's acquiescence to applying the leachate management process for Area 3 to Area 2A.

11. IDEM's Sept. 24, 2021 Post-Hearing Brief and the timeline prepared by Hoosier Energy's Petts, *Ex. 27*, accurately summarize documents and hearing testimony. After Permit 77-03's Jan. 12, 2018 issuance, leachate was observed in Area 2A perimeter ditches during the following IDEM inspections:

- Feb. 28, 2018: water with precipitate. *Ex. 7, p. 3; photos 3, 4.* (Mar. 16, 2018 IDEM violation/inspection letter).
- June 13, 2018: Hoosier Energy noted its belief that a cut or blockage in the unlined french drain caused the seep, and was in process of repair. *Ex. 8, p. 2, 3.* (June 21, 2018 IDEM inspection letter/return to compliance). IDEM's result of inspection was "Returned to compliance with violations cited during the Feb. 28, 2018 inspection". *Ex. 8, p. 1.*
- Sept. 5, 2018: leachate present, flowing, with noticeable odor, white precipitate, dark color. Flowed into a "collection pond which is more than 50 feet outside the solid waste boundary" of Area 2A. *Ex. 10, p. 3; photos 1 -3, 5-8* (Sept. 12, 2018 IDEM violation/inspection letter). Hoosier Energy to "immediately begin managing the seepage as leachate" and notified that migration of leachate in excess of 50 feet was prohibited by rule. *Id., p. 5.*
- Nov. 1, 2018: per Hoosier Energy's Response to Request for Additional Information ("RAI") about the Area 2A subdrain system, "water is seeping at the identified locations into the perimeter ditch, which flows into the Sedimentation Basin". *Ex. 12, p. 2.* April, 2018 perimeter ditch samples show mercury and other contaminants present, with the following constituents "exceeding the corresponding solid waste groundwater protection standards": arsenic, chloride, sulphate, total dissolved solids. *Id.; Attachment 2, p. 2, 4.*
- Dec. 11, 2018: seep still present, migrating through unlined drainage ditch to collection pond "outside the solid waste boundary". *Ex. 13, p. 3,5, photos, 1 – 6* (Dec. 20, 2018 IDEM violation/inspection letter). Matter is referred for IDEM enforcement. *Ex. 13.*
- March 26, 2019: leachate seep still present. *Ex. 14, p. 3, photos 5, 6* (April 4, 2019 IDEM violation/inspection letter).
- Sept. 10, 2019: leachate present in drainage ditch and seep actively flowing. *Ex. 16, p. 3, photos 2, 3* (Sept. 13, 2019 IDEM violation/inspection letter).
- Mar. 12, 2020: leachate seep present, chemical odor present in seep area, leachate entering ditches around Area 2B via culvert. *Ex. 17, p. 4, photos 9 – 14, 16* (Mar. 19, 2020 IDEM violation/inspection letter).

12. Permit Condition B1 requires Hoosier Energy to comply with laws stated in 329 IAC

10-28. *Id.*, p. 5. Hoosier Energy's permit 77-03 does not contain an exception to allow surface movement of leachate past a point fifty (50) feet outside of the solid waste boundary. *Ex. 6.* Hoosier Energy's Petts testified that there were conditions when leachate would have flowed to the sedimentation basin. *Tr. 185, 186.* At hearing, IDEM's Freeman measured the distances between the Area 2A solid waste boundary to the Area 2B solid waste boundary, from the westernmost point of Area 2A to the northernmost point of Area 2B, each of which exceeded 300 feet. *Tr. p. 55.* The March 19, 2020 inspection report noted that Area 2A leachate entered the ditches around Area 2B, confirmed through hearing testimony as in excess of 50 feet beyond the Area 2A solid waste boundary. *Tr. 81, 82; photos 14, 16.* The sedimentation basin is more than 300 feet from its easternmost and westernmost edges. *Tr. p. 55, 56.* Thus, the leachate's transit through the sedimentation basin would extend more than 50 feet beyond the solid waste boundaries of Areas 2A and 2B. *Id.*

13. The April, 2018 perimeter ditch samples showed mercury and other contaminants present, and arsenic, chloride, sulphate, total dissolved solids at levels in excess of regulatory standards. No further sampling data was presented, and no test results showed absence of contaminants.

14. Hoosier Energy established that extensive costs would have been incurred for interim measures. During a non-storm event, the daily volume of liquid was approximately 14,000 gallons per day, filling multiple tanker trucks. *Tr. 155.* Other fixes "were possible", *Tr. 206,* but they were extensive and costly, including construction of collection pits or additional roads, multiple large containers, power lines or generators, or transport of liquid to Indianapolis. *Tr. 150 – 160.* Hoosier Energy did not explore whether disposal in closer cities was available, to determine whether more affordable options existed. *Tr. 201.*

15. Hoosier Energy intended to control Area 2B (and 2A) leachate via a toe drain whose discharge arrived in the sedimentation basin. *Tr. 139, 140.* Hoosier Energy applied for an Insignificant Permit Modification, Ex. 3 (Oct. 19, 2018), *Tr. 130.*

16. IDEM rejected the toe drain concept; therefore on April 10, 2019, Hoosier Energy applied for a Minor Permit Modification to Permit 77-03, issued on June 27, 2019. *Tr. 135* (VFC # 80339461, entered under official notice and by agreement of the parties). The June 27, 2019 Minor Permit Modification adds Requirements D4 and D5 to the Jan. 12, 2018 permit renewal. *Id. p. 3.* In sum, Hoosier Energy is authorized to:

- Drain surface storm water from the perimeter ditches and sub-drains below these ditches into the existing Area 2B Sedimentation Basins on the west side of Area 2B;
- Collect leachate seepage/contact water from the lower slopes of the Area 2A landfill and transport it to the proposed National Pollutant Discharge Elimination System (NPDES) discharge location; and
- Collect leachate water from the existing collection system of the area 2B landfill and transport it to the proposed NPDES discharge location.

17. Area 2B (and 2A) discharge, including leachate, is authorized to flow through solid piping (approximately 5,000 feet, with twelve manholes), instead of permeable perforated pipe. *Tr. 130*. As in the case of the Site's Area 3 discharge (at Outfall 501), the Area 2B discharge is subject to NPDES-permitted outfall 901 with a leachate collection system. *Tr. 161*. As Hoosier Energy notes, the discharge ends up in the same place it did prior to IDEM's enforcement action, in to Turtle Creek Reservoir. However, the discharge is sampled for arsenic, selenium and boron, subject to monitoring reports, but not to specified limits or treatment. *Tr. 164, 165*.

18. IDEM pursued enforcement action, including assessment of civil penalty, against Hoosier Energy, based on the presence of uncontrolled and unauthorized leachate seepage once leachate seepage was discovered and until Hoosier Energy obtained its June 27, 2019 Minor Permit Modification.

#### Area 1 leachate

19. On Sept. 10, 2019, IDEM's inspector that Hoosier Energy's July 1, 2019 internal facility inspection report noted a new seep in Area 1. *Ex. 16, p. 6* (Sept. 13, 2019 Inspection letter). As a result of the routine inspection, Hoosier Energy was informed that migration beyond 50 feet of the solid waste boundary was prohibited unless authorized per the Site permit. IDEM's Dec. 19, 2019 routine inspection (Dec. 16, 2019) noted that the seep was referenced in a report from Hoosier Energy's Nov. 26, 2019 internal facility inspection. *Ex. 33, p. 4*. No enforcement referrals resulted from these inspections.

20. Area 1 seepage appeared migrating down the slope and outside of the solid waste boundary, as noted in IDEM's March 12, 2020 inspection report *Ex. 17, p. 5, photos 2- 8* (March 19, 2020 inspection report, enforcement referral letter). Area 1 seepage remained as noted on IDEM's Sept. 3, 2020 inspection. *Ex. 18, p. 5, photos 5, 12, 13, 14* (Sept. 4, 2020 inspection letter). IDEM did not cite an additional violation as a result of the Sept. 3, 2020 inspection. *Ex. 18, p. 1*.

21. IDEM's enforcement action for alleged seepage and migration from Area 1 did not include the imposition of a civil penalty.

22. On July 17, 2020, IDEM approved Hoosier Energy's application for a Minor Permit Modification to Permit 77-03, to install a drainage collection system for Area 1. *Ex. 24*.

#### Area 1, 3 erosion

23. Erosion rills were document in Areas 1 and 3 during IDEM's March 26, 2019 inspection. *Ex. 14, p. 4 -5* (April 4, 2019 inspection, enforcement referral letter).

24. Area 1 had a rill approximately 12 inches deep. *Id., photos 1, 2*. Hoosier Energy's Petts stated that repair could have been accomplished with a shovel, accessing the Site with a pickup truck. *Tr. 177*.



25. Area 3 erosion exposed waste. *Ex. 14, 4, 5, photo 4*. The erosion rill was noted in Hoosier Energy's internal facility inspection reports from Feb. 14, 2019 and March 18, 2019.

26. Hoosier Energy established that Spring, 2019 was excessively wet, *Tr. 175; Ex. 30, 31; Tr. 174*. The spring freeze/thaw cycle (nighttime below-freezing temperatures, daytime above-freezing temperatures) attracts surface moisture, resulting in difficult soil working conditions. *Tr. 176*. Thus, most landfill heavy-duty liner and cover construction work ceases between October and April. *Tr. 175*. Bulldozers can slide, gouging the landfill cover and creating safety hazards. *Tr. 177*. Hoosier Energy logs note that its dirt access roads were nearly impassible for typically-sized trucks. *Ex. 28; Tr. 157*. Hoosier Energy did note the various erosion issues "repair . . . when conditions allow". *Id.* An abnormally large rainfall event of 2.5" – 3.5" further worsened Site conditions. *Tr. 180, 181*. Area 3's stormwater design directed stormwater from a 40-acre top cell to a corner, then routed to a drop inlet. *Id.* Loose straw used to establish vegetation clogged Area 3's drop inlet. *Id.* The resulting 300,000 to 400,000 gallons of water on one day caused a deep cut into the intermediate cover. *Id.* Hoosier Energy acknowledged that the erosion could have been mitigated or prevented had it used a straw cover instead of loose straw. *Tr. 195 – 197*.

27. IDEM's March 26, 2019 inspection report documented that repairs were not made. *Ex. 14, p. 4, 5, 17, 25, photo 4*. IDEM's June 28, 2019 inspection report documented that the rills had been repaired. *Ex. 15, p. 4, 5 (June 28, 2019 inspection letter, violation referral)*.

#### IDEM enforcement action

28. Regarding the alleged leachate violations, IDEM initially waived enforcement via a Notice of Violation ("NOV") while the parties attempted to negotiate an Agreed Order. *Ex. 20, p. 1* (negotiations included a lower penalty of \$18,000, *Ex. 23; Tr. 120 – 122*). As negotiations did not fully resolve the matter, IDEM elected to issue an NOV so as to comply with requirements stated in I.C. § 13-30-3-3. On March 26, 2020, IDEM issued a NOV and Proposed Agreed Order to Hoosier Energy, under IDEM's enforcement case number 2018-25885-S. *Ex. 20*. In its NOV, IDEM cited violations of 329 IAC 10-28-15(a)'s requirement to immediately manage or control leachate to prevent offsite migration, 329 IAC 10-28-15(b)'s prohibition on allowing leachate to migrate more than 50 feet past the solid waste boundary, and Permit 77-03 Condition G3's requirement that seepage from Area 2A be managed as leachate until the seepage is determined to be contaminant-free. *Id. p. 1, 2*. IDEM imposed a civil penalty of \$25,000, based upon major potential for harm and a major extent of deviation *Ex. 21* (Civil Penalty Policy Worksheet), per IDEM's Civil Penalty Policy. *Ex. 25*.

29. Regarding the alleged erosion violations, on Sept. 12, 2019, IDEM issued a NOV and Proposed Agreed Order to Hoosier Energy, under IDEM's enforcement case number 2019-26080-S. *Ex. 19*. In its NOV, IDEM cited violations of 329 IAC 10-28-11(b), 329 IAC 10-28-14(a) and Condition D15 of Permit 77-04 (official notice taken of VFC Doc. 80339461). *Id., p. 3, 4*. In

sum, IDEM alleged that Hoosier Energy did not apply, maintain or compact cover or implement appropriate erosion prevention and control measures. *Id.*

30. After Hoosier Energy declined to enter into an Agreed Order, on August 14, 2020, the IDEM Commissioner issued a Notice and Order per I.C. § 13-30-3-4 (“Commissioner’s Order” or “CO”), addressing both cases. *Ex. 24.*

31. For the leachate-related allegations, IDEM’s CO required that Hoosier Energy:

- Immediately cease and desist violations of rules and permit condition. *Ex. 24, p. 4, ¶ 16.*
- Within 15 days, comply with 329 IAC 10-13-4(c). Comply with the compliance schedule in PC G3 of Permit 77-03. Per the Jan. 12, 2018, 77-03 Permit renewal, seepage from Area 2A must be managed as leachate until the seepage is determined to be free of contaminants. Interim corrective action measures must be implemented to collect leachate until the permanent leachate collection system is installed and operating. *Id., ¶ 17.*
- Within 12 months, install a leachate collection system for Area 2 as specified in PC D4a in Permit 77-03 and the Minor Modification 77-03 Permit Application dated April 10, 2019. *Id., ¶ 18.*
- Within 12 months, construct a seepage collection system for Area 1 as specified in PC D6 and D7 in Permit 77-03 and the Minor Modification 77-03 Permit Application dated May 5, 2020. *Id., ¶ 19.*
- pay civil penalties of \$25,000. *Id., ¶ 20.*

32. For the allegations concerning erosion, IDEM’s CO required immediate rule compliance and cover maintenance. *Id.* IDEM imposed a civil penalty of \$4250, *Id., p. 7*, based upon minor potential for harm and a major extent of deviation *Ex., 22* (Civil Penalty Policy Worksheet), per IDEM’s Civil Penalty Policy. *Ex. 25.*

33. On September 17, 2020, Hoosier Energy timely petitioned for administrative review of IDEM’s August 14, 2020 Commissioner’s Order (“CO”) concerning Site operations (not construction or design). A final hearing was conducted on Aug. 5, 2021. Post-hearing briefs were filed, and a final order schedule agreed upon.

### **CONCLUSIONS OF LAW**

1. The Indiana Department of Environmental Management (“IDEM”) is authorized to implement and enforce specified Indiana environmental laws, and relevant rules, per I.C. § 13-13, *et seq.* The Office of Environmental Adjudication (“OEA” or “Court”) has jurisdiction over the decisions of the Commissioner of IDEM and the parties to this controversy, per I.C. § 4-21.5-7, *et seq.*, and I.C. § 4-21.5-3-7(a)(1)(A). Matters before OEA are subject to procedures stated in I.C. § 4-21.5-3, *et seq.* and 315 IAC 1, *et seq.*

2. This is a final order pursuant to I.C. § 4-21.5-3-27 and 315 IAC 1-2-1(10). Findings of Fact that may be construed as Conclusions of Law, or Conclusions of Law that may be construed as Findings of Fact, are so deemed.

3. The OEA's findings of fact must be based exclusively on the evidence presented to the Environmental Law Judge ("ELJ") and deference to the agency's initial factual determination is not allowed. I.C. § 4-21.5-3-27(d); *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E. 100 (Ind. 1993); *Indiana-Kentucky Electric v. Commissioner, Indiana Department of Environmental Management*, 820 N.E.2d 771, 781 (Ind. App. 2005). "De novo review" means that "all issues are to be determined anew, based solely upon the evidence adduced at the hearing and independent of any previous findings." *Grisell v. Consol. City of Indianapolis*, 425 N.E.2d 247 (Ind. Ct. App. 1981).

4. OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Env'tl. Adjud.*, 811 N.E.2d 806, 809 (Ind. 2004)(appeal of OEA review of NPDES permit); *see also* I.C. § 4-21.5-3-27(d). "Standard of proof generally has been described as a continuum with levels ranging from a "preponderance of the evidence test" to a "beyond a reasonable doubt" test. The "clear and convincing evidence" test is the intermediate standard, although many varying descriptions may be associated with the definition of this intermediate test." *Matter of Moore*, 453 N.E.2d 971, 972, n. 2. (Ind. 1983). The "substantial evidence" standard requires a lower burden of proof than the preponderance test, yet more than the scintilla of the evidence test. *Ind. Dep't of Natural Res. v. Prosser*, 132 N.E.3d 397, 401 (Ind. Ct. App. 2019); *see also* *Burke v. City of Anderson*, 612 N.E.2d 559, 565, n.1 (Ind. Ct. App. 1993). *Gas America* 347, 2004 OEA 123, 129. *Blue River Valley*, 2005 OEA 1, 11-12. *Objection to the Denial of Excess Liability Trust Fund Claim Marathon Point Service, ELF #9810570/FID #1054, New Castle, Henry County, Indiana; Winimac Service, ELF #9609539/FID #14748, Winimac, Pulaski County, Indiana; HydroTech Consulting and Engineering, Inc.*, 2005 OEA 26,41.

5. IDEM bears the burden of proof and persuasion to sustain the violations alleged against Hoosier Energy in its Commissioner's Order. I. C. § 13-30-3-9.

6. Complainant IDEM seeks enforcement of its Commissioner's Order.

7. To be valid, an IDEM Commissioner's Order must specify the environmental management laws or rules which IDEM alleges are being violated, and must state the manner and extent to which the alleged violation exists. I.C. § 13-30-3-4(b)(2).

8. IDEM must meet its burden of proof that, by substantial evidence, Hoosier Energy violated the laws set forth in the August 14, 2020 Commissioner's Order ("CO").

9. For IDEM Case No. 2018-35885-S, concerning Area 2A leachate management, Hoosier Energy violated the rules set forth in IDEM's CO. Per 329 IAC 10-28-15(a), "any leachate on the surface of restricted waste sites Type I and II . . . must be immediately managed or controlled to prevent off-site migration". Permit 77-03 Condition G3 further required that Hoosier Energy "shall manage the seepage as leachate until such time the seepage is determined to be free of

contaminants and meets the groundwater protection standards in Section C of this permit.” *Ex. Ex. 24, p. 2.* Hoosier Energy has other permitted Sites which seem to function without producing uncontrolled leachate, including Area 3. The evidence is clear that Hoosier Energy and IDEM put forth effort, and Hoosier Energy expended significant resources, to rectify an ongoing problem, culminating with installation of an effective, permitted plan. The record before the Court establishes substantial evidence that IDEM identified moisture (in excess of the typical stormwater, which is the drainage system’s designed purpose to carry) in inspections on June 15, 2017 and on Aug. 16, 2017, and requested that Hoosier Energy identify seepage constituents and submit a management plan to contain seepage. On Jan. 18, 2018, Hoosier Energy obtained an operating permit, including new Section G, setting forth Hoosier Energy’s obligations, given the Site’s specific properties. IDEM’s following Site inspections continued to document that the seeping moisture had odor, color and other properties beyond those found in storm water. The June 13, 2018 inspection report noted that Hoosier Energy was working on the possibility that a cut French drain allowed leachate to continue to flow. The Nov. 1, 2018 inspection report documented ongoing leachate flow, and contained reference to Hoosier Energy’s constituent testing, which detected mercury, and levels of arsenic, chloride, sulphate and total dissolved solids exceeding regulatory limits. The Minor Permit Modification issued on June 27, 2019 required that the Area 2A and 2B combined drainage flow through an impermeable piping system to regulated (NPDES) outflow 901. Although the discharge will “end up in the same place” as the discharge for which IDEM initially sought enforcement, the regulated discharge will be subject to leachate collection and monitoring. The March 12, 2020 inspection report presents evidence that leachate flow continued, and bears a chemical odor. Eventually, the plans approved in the Minor Permit Modification were put in to effect so that they functioned effectively.

10. Per 329 IAC 10-28-15(b), “any surface movement of leachate past a point fifty (50) feet outside of the solid waste boundary is prohibited except as specified in the facility permit”. Hoosier Energy’s permit 77-03 does not contain an exception to 329 IAC 10-28-15(b). Measurements submitted into evidence establish that offsite migration exceeded 50 feet outside of the solid waste boundary of Area 2A and 2B.

11. For IDEM Case No. 2018-35885-S, concerning Area 1 leachate management, Hoosier Energy violated the rules set forth in IDEM’s CO. IDEM’s initial investigations on Sept. 10, 2019 and Dec. 16, 2019 note seepage, but do not refer the matter to enforcement. By March 12, 2020, the inspection shows that the seepage is migrating off-site, more than 50 feet outside of the solid waste boundary. Per the analysis and conclusions reached above for Area 2A, Area 1 offsite migration likewise violated the rules set forth in IDEM’s CO. No further evidence of noncompliant seepage is presented after Hoosier Energy installed the drainage collection system authorized in the July, 2020 Minor Permit Modification to 77-03. In its CO, IDEM does not seek imposition of a civil penalty concerning Area 1.

12. Hoosier Energy’s contentions that leachate management was sufficient, compliant with laws and regulations cited by IDEM, or was to some degree impossible, is not supported by the evidence. Although Hoosier Energy exerted effort and resources to bring its Area 1, Area 2A

and 2B discharges in to compliance, IDEM presented substantial evidence that Hoosier Energy did not immediately control or manage surface leachate to prevent offsite migration, in violation of 329 IAC 10-28-15(a), 329 IAC 10-28-15(b), Permit 77-03 Condition G, until implementation of the Minor Source Modification drainage system.

13. For IDEM Case No. 2019-26080-S, concerning Areas 1 and 3 erosion control. Hoosier Energy violated the rules set forth in IDEM's CO. Per 329 IAC 10-28-11(b), cover must be applied and maintained at restricted waste sites Type I and Type II and nonmunicipal solid waste landfills in accordance with the applicable requirements of this rule and 329 IAC 10-30-2 or 329 IAC 10-30-3. Other provisions for cover may be approved by the commissioner if it can be demonstrated that an alternate cover or site design will provide an adequate level of environmental protection.

14. Per 329 IAC 10-28-14(a) Cover material applied as required in sections 11 through 13 of this rule and 329 IAC 10-30-2 or 329 IAC 10-30-3 must be continuously maintained, including application and compaction of additional cover as needed to maintain required depth. In sum, IDEM alleged that Hoosier Energy did not apply, maintain or compact cover or implement appropriate erosion prevention and control measures. *Id.* IDEM imposed a civil penalty of \$4250, *Id.*, p. 7, based upon minor potential for harm and a major extent of deviation *Ex.*, 22 (Civil Penalty Policy Worksheet), per IDEM's Civil Penalty Policy. *Ex.* 25.

15. Erosion rills were documented in Areas 1 and 3 during IDEM's March 26, 2019 inspection. The rill in Area 1 was approximately 12 inches deep, and there was some possibility that it could have been accessed without specialized vehicles and repaired with a hand tool. Area 3's erosion was noted in Feb. and March, 2019 investigations. The cut was large, and penetrated the intermediate cover layer, exposing waste. By June, 2019, the erosion rills had been repaired. In the interim, the Site experienced a significant and unusual rainfall event during a season when landfill cover access is dangerous to the workers and to the integrity of the cover. The area is remote, and lacks infrastructure needed to implement repairs and to engage in moving discharge, whether by hauling, diversion or containment. Loose straw used to nurture a cover crop may have contributed to the severity of Area 3's erosion, but no evidence was presented that use of a cover blanket would have significantly minimized the impact.

16. I.C. § 13-30-4-1 authorizes the IDEM to assess a maximum penalty of \$25,000 per day per violation. IDEM used the Civil Penalty Policy (1999), *Ex.* 25, to determine the appropriate penalties in this matter. IDEM's Civil Penalty Policy is a non-rule policy document, ID No. Enforcement 99-0002-NPD, originally adopted on April 5, 1999 in accordance with I.C. § 13-14-1-11.5. According to this policy, a civil penalty is calculated by "(1) determining a base civil penalty dependent on the severity and duration of the violation, (2) adjusting the penalty for special factors and circumstances, and (3) considering the economic benefit of noncompliance." *Id.*

17. The base civil penalty is calculated taking into account two factors: (1) the potential for harm and (2) the extent of deviation. *Id.* The policy states that the potential for harm may be determined by considering “the likelihood and degree of exposure of persons or the environment to pollution” or “the degree of adverse effect of noncompliance on statutory or regulatory purposes or procedures for implementing the program”. *Id.* There are several factors that may be considered in determining the likelihood of exposure. *Id.* These are the toxicity and amount of the pollutant, the sensitivity of the human population or environment exposed to the pollutant, the amount of time exposure occurs and the size of the violator. *Id.* The policy further states that the extent of deviation relates to the degree to which the requirement is violated. *Id.* A moderate extent of deviation is defined as “The violator significantly deviates from the requirements of the regulation, permit, or statute or only some of the requirements are implemented”. *Id.*

18. Here, Jennifer Reno, an IDEM Section Chief for the Land Enforcement Section, explained the Civil Penalty Policy and worksheets typically function, but further testified that two other former IDEM staff members calculated the penalties. *See Tr. 112 – 126.*

19. Concerning leachate violations, IDEM imposed a civil penalty of \$25,000, based upon major potential for harm and a major extent of deviation *Ex., 21* (Civil Penalty Policy Worksheet), per IDEM’s Civil Penalty Policy. *Ex. 25.* IDEM assessed the penalty on the basis that the violations had a major potential for harm and major extent of deviation. The civil penalty policy provides that the penalty range for a major/major violation is \$25,000 to \$20, 000. *Id., p. 4.* IDEM’s Reno testified that she did not know whether a penalty matrix for landfill leachate was applied to Hoosier Energy. *Tr. 126, See Ex. 37.* IDEM selected \$25,000 as the base penalty. *Ex. 21.* The penalty is multiplied by the number of violations, which IDEM determined as 1. *Id.* No other adjustments were made. *Id.* Therefore, IDEM’s total calculated penalty for leachate-related violations in IDEM Case 2018-25995-S is \$25,000.00. *Id.*

20. For erosion-related violations in IDEM Case 2019-26080-S, IDEM imposed a civil penalty of \$4250, *Id., p. 7,* based upon minor potential for harm and a major extent of deviation *Ex., 22* (Civil Penalty Policy Worksheet), per IDEM’s Civil Penalty Policy. *Ex. 25.* A minor potential for harm is defined as (1) the violation poses a relatively low likelihood of exposure or degree of exposure to pollution; and/or (2) The actions have or may have an adverse effect on the statutory or regulatory purposes or procedures for implementing the program. *Id., p. 3.* The civil penalty policy provides that the penalty range for a minor/major violation is \$5,000 to \$3,500 *Id., p. 4.* IDEM selected \$4,250 as the base penalty. *Ex. 22.* The penalty is multiplied by the number of violations, which IDEM determined as 1. *Id.* No other adjustments were made. *Id.* Therefore, IDEM’s total calculated penalty for leachate-related violations in IDEM Case 2019-26080-S is in the midrange, \$4,250.00. *Id.*

21. The OEA may use the Civil Penalty Policy in accordance with the Court of Appeals’ decision in *IDEM v. Schnippel Construction Inc., 778 N.E.2d 407* (Ind. Ct. App. 2002). *Commissioner, Indiana Department of Environmental Management, v. Glidden Fence Company, Inc., 2015 OEA 1, (14-A-J-4733) 2015 OEA 1, page 10, 28.*

22. For leachate, this violation is major/major. The potential for harm was major: leachate migrated offsite, was not controlled, contained constituents including mercury, with arsenic, chloride, and sulphate above regulatory levels, and entered into Turtle Creek Reservoir without a leachate collection system or monitoring. The deviation was major. Hoosier Energy significantly deviated from the requirements of the regulation, permit or statute to the extent that there was substantial noncompliance. These deviations occurred while Hoosier Energy was attempting to devise solutions acceptable to IDEM, and had other Sites which operated without problems. As Hoosier Energy did consistently work with a consultant and its own professionals to bring the Areas 2A and 1 in to permitted compliance, the penalty should be assessed from the low point of the range. Therefore, the total calculated penalty for leachate-related violations in IDEM Case 2018-25995-S is \$20,000.00.

23. For erosion, this violation is minor/moderate. The potential for harm was minor: the violation posed a relatively low likelihood of exposure or degree of exposure to pollution; and/or (2) The actions have or may have an adverse effect on the statutory or regulatory purposes. Landfill erosion is common, but requires prompt response. Area 3's rill exposed waste. There was no evidence that a release occurred. Area 1 had a relatively small rill. Despite significant weather challenges, the Sites were capable of being fixed, and were repaired within a couple of months. The deviation was moderate: a significant deviation from the requirements of the regulation, permit or statute or only some of the requirements are implemented. *Ex. 25, p. 3.* Hoosier Energy's erosion significantly deviated from the regulatory requirements, but did so for a brief time while Hoosier Energy remained ready to repair when feasible. Substantial evidence was not presented as to substantial noncompliance. As with the leachate management, these deviations occurred while Hoosier Energy was attempting to devise solutions acceptable to IDEM, and had other Sites which operated without problems. The range for a is \$3,500 to \$2,000. As Hoosier Energy did consistently work Areas 1 and 3 in to permitted compliance, the penalty should be assessed from the low point of the range. Therefore, the total calculated penalty for leachate-related violations in IDEM Case 2018-25995-S is \$2,000.00.

24. Hoosier Energy contends that no penalties or significantly lower penalties should apply. Hoosier Energy's relies on whether or what level of enforcement IDEM selected in other cases. Indiana's legislature has specifically exempted an agency's determination to pursue enforcement from administrative review under I.C. §4-21.5-2-5(8). OEA has sustained IDEM's "extreme latitude" to prosecute enforcement matters in multiple decisions, balanced against OEA's duty to apply *de novo* review to IDEM's choices.

25. Complainant IDEM met its burden of proof that August 14, 2020 Commissioner's Order as to Hoosier Energy should be sustained. By substantial evidence the Commissioner's Order should be affirmed, except as to the amount of penalty to be assessed.

**FINAL ORDER**

**AND THE COURT**, being duly advised, **FINDS and ORDERS** that Complainant Indiana Department of Environmental Management has established, by substantial evidence, that except as to penalty amount, it properly issued a Commissioner's Order to Respondent Hoosier Energy Rural Electric Cooperative, Inc. for offsite leachate discharge and erosion control violations at 5500 Old Highway 54, Sullivan Sullivan County, Indiana.

**THE COURT ORDERS, ADJUDGES AND DECREES** that Complainant, Indiana Department of Environmental Management's August 14, 2020 Commissioner's Order is **SUSTAINED**, except for the amount of civil penalty to be assessed. The Commissioner's Order is **ORDERED** modified to provide:

1. paragraph 20, the amount is **ORDERED** modified to the amount of Twenty Thousand Dollars (\$20,000), regarding civil penalty; and
2. paragraph 23: the amount is **ORDERED** modified to the amount of Two Thousand Dollars (\$2,000), regarding civil penalty.

Respondent Hoosier Energy Rural Electric Cooperative, Inc. is **ORDERED** to comply with the Indiana Department of Environmental Management August 14, 2020 Commissioner's Order, in all other respects.

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. § 4-21.5-5, *et seq.* Pursuant to I.C. § 4-21.5-5-5, a Petition for Judicial Review of a Final Order is timely only if filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

**IT IS SO ORDERED this 16<sup>TH</sup> day of June, 2022 in Indianapolis, IN.**

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Hon. Mary L. Davidsen  
Chief Environmental Law Judge



