MAY 04 2021

INDIANA OFFICE OF ENVIRONMENTAL ADJUDICATION

Mary Davidsen
Chief Environmental Law Judge

INDIANA GOVERNMENT CENTER NORTH
100 NORTH SENATE AVENUE
SUITE N103
INDIANAPOLIS, IN 46204-2211
(317) 233-0850
(317) 233-9372 FAX

STATE OF INDIANA	)	BEFORE THE INDIANA OFFICE OF
	)	ENVIRONMENTAL ADJUDICATION
COUNTY OF MARION	)	

IN THE MATTER OF:	)	
	)	
OBJECTION TO THE ISSUANCE OF PARTIAL	)	
APPROVAL OF CLOSURE/POST CLOSURE PLAN	)	CAUSE NO. 20-S-J-5095
DUKE GALLAGHER GENERATING STATION	)	
ASH POND SYSTEM	)	
DUKE ENERGY INDIANA LLC	)	
FLOYD COUNTY, INDIANA	)	
	)	
Hoosier Environmental Council	)	
Petitioner	)	
Duke Energy Indiana LLC	)	
Permittee/Respondent	)	
Indiana Department of Environmental Management	)	
Respondent	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

The parties filed motions for summary judgment. The presiding Environmental Law Judge (the ELJ), having read the motions, responses and replies and examined the evidence, now enters the following findings of fact, conclusions of law and order:

Findings of Fact

1. Gallagher Generating Station (Gallagher Station or Station) is a two-unit coal-fired power plant located in Floyd County, New Albany, Indiana. There are two active units, Units 2 and 4, that began operating in 1958 and 1961, respectively. There are also two retired units, Units 1 and 3. The station is located along the west bank of the Ohio River and across from Louisville, Kentucky.

2. Duke Energy Indiana LLC (Duke or Duke Energy) submitted its closure/post closure application for the coal combustion residuals (CCR) ponds in December 2016.

3. The Indiana Department of Environmental Management's (IDEM) review process for the Closure Plan took more than three years to complete and involved more than a dozen agency subject matter experts. IDEM issued several detailed "Requests for Additional

Information," and Duke Energy filed its responses. There were a number of technical meetings between IDEM and Duke Energy. And IDEM solicited public comments on the Closure Plan, received comments from several third-party environmental interest groups, including Petitioner, and responded to all comments on the Closure Plan.

4. On December 10, 2019, the Indiana Department of Environmental Management (IDEM) issued the Partial Approval of the Closure/Post Closure Plan (the Partial Approval) to Duke Energy Indiana LLC (Permittee or Duke) for the Ash Pond System at the Gallagher Generating Station. The ash ponds subject to this Approval, are the North Ash Pond, Primary Pond Ash Fill Area, Ash Pond A, Secondary Settling Pond, and Coal Pile Ash Fill Area.

5. The Station has two other ash ponds, the Primary Pond and Ash Pond B. The Primary Pond has not received closure approval. The Primary Pond contained both CCR and liquid until at least October 19, 2015. It was identified as a separate water treatment unit in the Station's NPDES permit.

6. The closure plan for Ash Pond B was approved in the Restricted Waste Site Type I facility (Solid Waste Program ID 22-01) minor modification dated November 1, 2016. Neither the Primary Pond nor Ash Pond B are at issue in this litigation.

7. The Approval authorizes the closure of surface impoundments containing CCR as follows:

   a. North Ash Pond - closure in place and is subject to 329 IAC 10-3-1(9).
   b. Primary Pond Ash Fill Area - closure in place and is subject to 329 IAC 10-3-1(9).
   c. Ash Pond A - closure by removal of CCR material and one additional foot of underlying soil. This pond is subject to 329 IAC 10-3-1(9) and 329 IAC 10-9-1(c) with 40 CFR 257.
   d. Secondary Settling Pond - closure in place with removal of only CCR material. This pond is subject to 329 IAC 10-3-1(9) and 329 IAC 10-9-1(c) with 40 CFR 257.
   e. Coal Pile Ash Fill Area -- closure by removal of CCR material and one additional foot of underlying soil. This pond is subject to 329 IAC 10-3-1(9). Upon removal of CCR material and one foot of underlying soil, this pond will be re-purposed to serve as a geomembrane lined (non-CCR) pond to store leachate and industrial storm water from the permitted Restricted Waste Site (RWS) Type 1 landfill and other runoff from the Gallagher Station.

8. Petitioner, Hoosier Environmental Council (Petitioner or HEC), filed its Petition for Administrative Review on January 27, 2020[1]. Petitioner has challenged the closures of

[1] On May 5, 2020, the presiding ELJ issued Findings of Fact, Conclusions of Law and Order denying Duke's Motion to Dismiss, finding that Petitioner had timely filed its petition for review.

five of the former ash ponds in this litigation – Ash Pond A, the Secondary Settling Pond, the Coal Pile Ash Fill, the North Ash Pond, and the Primary Pond Ash Fill.

9. HEC filed its Amended Petition for Administrative Review on March 6, 2020 and alleges that the Approval violates the following regulations: 329 IAC 10-30-1; 40 CFR 257.102 and 329 IAC 10-9-1; CCR Rule at 40 CFR 257 Subpart D; 40 CFR 257.101; 329 IAC 10-3-1(9); and I.C. § 13-30-2-1(1).

10. HEC requests the following relief[2]:

    a. complete excavation of all CCR in the Ash Pond System at the Gallagher facility including CCR in the North Ash Pond, Ash Pond A, Primary Pond, Primary Pond Ash Fill, and Coal Pile Ash Fill; and
    b. proper disposal of this CCR in a safe, dry CCR landfill that complies with the construction and siting requirements for new CCR landfills found in 40 CFR 257 Subpart D and is at least as protective as the CCR excavation and management activities being undertaken by Duke Energy at its CCR facilities in North Carolina.

11. IDEM determined that Ash Pond A and the Secondary Settling Pond are governed by, and must be closed pursuant to, the Federal CCR Rule requirements at 40 C.F.R. § 257, subpart D[3] (hereafter referred to as the Federal CCR Rule). IDEM determined that the Coal Pile Ash Fill, the North Ash Pond, and the Primary Pond Ash Fill are not subject to the regulations set forth in the Federal CCR Rule but are subject to 329 IAC 10-3-1(9).

12. Between approximately 1958 until 1987, coal ash was sluiced to an unlined area called the Original Ash Pond. Duke stopped using this area in approximately 1987 and covered it with approximately six (6) inches of soil and seeded it. The Primary Pond was formed within the footprint of the Original Ash Pond. The North Ash Pond and the Primary Pond Ash Fill Area are also located in the footprint of the Original Ash Pond. The bottom elevation of North Ash Pond and Primary Pond Ash Fill lie beneath the elevation of groundwater. No CCR was excavated from the Original Ash Pond. There are no underground barriers between these 3 ponds in the Original Ash Pond. No portion of the Original Ash Pond is lined.

13. The Station is located within the 1% annual chance flood area (commonly referred to as 100-year flood).

14. Ash Pond A:

    a. In approximately 1973, the Station constructed Ash Pond A, an area of about 36 acres, and began operating the impoundment to provide ash management and water

[2] Amended Petition for Administrative Review, filed March 6, 2020, pg. 7.
[3] 40 C.F.R. Part 257, subpart D (Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities, 80 Fed. Reg. 21,301 (April 17, 2015)).

treatment needed for Station operation. Ash Pond A ceased receiving sluiced ash for initial settling in the pond around November 15, 2020.

b. After 2016, the decant water from Ash Pond A was eventually discharged directly to the Ohio River through the Station's National Pollutant Discharge Elimination System (NPDES) permitted outfall.
c. Groundwater beneath Ash Pond A generally flows east toward the Ohio River.
d. To date, Ash Pond A has not been dewatered. Therefore, it still has significant hydraulic head pressure.
e. The CCR material and one foot of underlying soil will be excavated. Closure must be conducted in accordance with to 329 IAC 10-3-1(9) and 329 IAC 10-9-1(c) with 40 CFR 257, including 18 inches of soil cover and 6 inches of vegetative cover.
f. CCR excavated from Ash Pond A may be used as structural fill for the subgrade of the engineered cover system at the North Ash Pond and the Primary Pond Ash Fill.

15. Secondary Settling Pond:

a. The Secondary Settling Pond, an area of approximately 4 acres, was constructed and began operating as an ash management and water treatment unit in approximately 1973. The Secondary Settling Pond received decant water from Ash Pond A so that additional settling of ash could occur. The decant water from the Secondary Settling Pond was discharged to the Ohio River in accordance with applicable laws.
b. Groundwater beneath the Secondary Settling Pond generally flows northeast toward the Ohio River.
c. CCR from the Secondary Settling Pond was completely excavated in 2016.
d. This pond will be closed in place with removal of only CCR material. This pond is subject to 329 IAC 10-3-1(9) and 329 IAC 10-9-1(c) with 40 CFR 257.
e. The cover components include:
    - Compacted soil structural fill
    - 18 inches of compacted soil layer with a hydraulic conductivity of not greater than 1x10-5 centimeter/second
    - 6 inches of vegetative cover

16. Primary Pond Ash Fill:

a. The Primary Pond Ash Fill occupies approximately 7.5 acres within the footprint of the Original Ash Pond. It was dewatered in approximately 1987 as part of the Original Ash Pond. It ceased being a water treatment unit at that time. No CCR was placed in this pond after 1987. Later, some of the CCR that was excavated from the construction of the Primary Pond (discussed above) was also placed on top of the Primary Pond Ash Fill.
b. Following the construction of the Primary Pond, the surface of the Primary Pond Ash Fill was covered with a soil veneer, vegetated, and maintained in its current condition.
c. There are perimeter roads around the Primary Pond Ash Fill.
d. The average groundwater elevation beneath the Primary Pond Ash Fill is presently at approximately 435 ft. The base of the ash in the Primary Pond Ash Fill is at an elevation of approximately 413 ft. Therefore, under current conditions, groundwater,

in general terms, flows laterally east toward the Ohio River and is in contact with the ash at the bottom of the Primary Pond Ash Fill as the groundwater proceeds through the site.

e. This pond will be closed in place, subject to 329 IAC 10-3-1(9).
f. The final cover system must include:
    - 30 -mil PVC or 40 -mil LLDPE or 60 -mil HDPE geomembrane liner or equivalent installed over structural fill
    - Geotextile cushion or geocomposite drainage layer
    - 30 inches of uncompacted cover soil
    - 6 inches of vegetative cover

17. North Ash Pond:

g. In 1987, the approximately 40-acre area of the Original Ash Pond to the north of the Primary Pond (called the "North Ash Pond") was dewatered and a soil veneer and vegetation was placed over it. It ceased being a water treatment unit at that time. No CCR was placed in this pond after 1987. Over the last 30 years, this former ash pond area has often been used as a construction lay down area, and it is crossed by multiple active transmission lines and other utility infrastructure. There are perimeter roads around the North Ash Pond.
h. The average groundwater elevation for the majority of the area beneath the North Ash Pond is presently at approximately 437 ft. The base of the ash at the bottom of the North Ash Pond is at an approximate elevation of 413 ft. Therefore, groundwater, in general, flows laterally toward the Ohio River and is in contact with the ash at the bottom of the North Ash Pond as the groundwater proceeds through the site.
i. This pond will be closed in place, subject to 329 IAC 10-3-1(9).
j. The final cover system must include:
    - 30 -mil PVC or 40 -mil LLDPE or 60 -mil HDPE geomembrane liner or equivalent installed over structural fill
    - Geotextile cushion or geocomposite drainage layer
    - 30 inches of uncompacted cover soil
    - 6 inches of vegetative cover

18. Coal Pile Ash Fill:

a. The former Coal Pile Ash Fill was constructed in 2001 and is located in the southern half of the original limits of the Station's coal pile. At that time, an embankment was constructed to isolate an approximately 11-acre area from the active coal pile on the north. The Coal Pile Ash Fill was filled with ash excavated from other on-site ash ponds. The area was then covered with soil and vegetated, and generally utilized as a construction lay-down area.
b. Groundwater beneath the Coal Pile Ash Fill generally flows east toward the Ohio River.
c. CCR from the Coal Pile Ash Fill was excavated in 2020.
d. This will be closed by removal of CCR material and one additional foot of underlying soil. This pond is subject to 329 IAC 10-3-1(9). Upon removal of CCR material and

one foot of underlying soil, this pond will be re-purposed to serve as a geomembrane lined (non-CCR) pond to store leachate and industrial storm water from the permitted Restricted Waste Site (RWS) Type 1 landfill and other runoff from the Gallagher Station.

19. The Approval authorizes the use of CCR material from Ash Pond A as structural fill for the subgrade for the engineered cover system involving the closure of the North Ash Pond and the Primary Pond Ash Fill. This structural fill will be used to provide proper drainage for the cover system. The ash to be used as structural fill will have at least 10 – 43 feet of separation from groundwater.

20. There is an extensive network of groundwater monitoring wells that have been sampled over the years to identify any potential groundwater impacts involving the Station's current and decommissioned ash ponds as well as the Station's Landfill.

21. As part of the development and implementation of the Closure Plan, Duke Energy has been submitting monitoring well sampling data to IDEM since 2017. In accordance with Section D.23 of the Closure Plan, Duke Energy continues to conduct semi-annual groundwater sampling and submits that data to IDEM.

22. Duke Energy is required to follow the standard practices for well installation for the monitoring well networks, which are set forth in 329 IAC 10-21-4 and 312 IAC 13. As noted in Section D.3 of the Closure Plan, the location of the Station's groundwater monitoring well system was analyzed during IDEM's review of the Closure Plan application and approved as part of the Closure Plan.

23. Groundwater sampling events for the ash impoundments at Gallagher Station were conducted in accordance with the Station's Sampling and Analysis Plan for the Station's approved on-site restricted waste site ("RWS") Type I Landfill (SW ID 22-01), ensuring that high quality data was collected for evaluation, until IDEM approved the Sampling and Analysis Plan for the Station's Ash Pond System on June 30, 2020, in accordance with Section F.1 of the Closure Plan.

24. Pursuant to Section F.3 of the Closure Plan, IDEM approved the Statistical Evaluation Plan for the Station's Ash Pond System on June 11, 2020.

25. Section D.3 of the Closure Plan outlines the requirements for the monitoring well system and the changes that will be made to the current monitoring well system due to construction activities.

26. In accordance with the Closure Plan, Duke Energy submitted its Monitoring Well Installation Work Plan to IDEM on June 5, 2020, which contained industry standard practices consistent with 329 IAC 10-21-4 and 312 IAC 13 for the method of well installation. This Monitoring Well Plan sets out the location for the installation of the remaining five (5) monitoring wells that will be installed after closure activities are completed. IDEM approved this Monitoring Well Work Plan on August 14, 2020.

27. Pursuant to 329 IAC 10-15-5(7), wells must have a well spacing of (500) feet.

28. 329 IAC 10-24-4 requires a minimum number of monitoring wells based on the acreage of the units being assessed. In this case, pursuant to Section D.3 of the Closure Plan, Gallagher Station's final, post-closure monitoring well system related to the ponds at issue has approximately 26 monitoring devices compared to the minimum of approximately 17 monitoring devices required by this regulation.

29. In mid-2020, Duke Energy also installed Monitoring Wells T-1 and T-2, which are being added to the Station's Monitoring Well Network. According to Duke Energy, MWs T-1 and T-2 were installed so that Duke Energy could better understand the groundwater quality at Gallagher Station, particularly the groundwater quality downgradient from the former North Ash Pond near where such groundwater interfaces with the Ohio River.

30. To date, the sampling results from MWs T-1 and T-2 have not exceeded any drinking water standards ("Maximum Contaminant Levels" or "MCLs") or other enforceable health-based standards.

31. The Station has used, and continues to use, an on-site groundwater well screened in the sand and gravel aquifer on the eastern portion of the Site (near the Ohio River) to supply its drinking water. To date, the sampling results from this drinking water well have not exceeded any MCL or health-based standards.

32. The Closure Plan imposes requirements regarding the construction of an engineered cover system that exceeds all state and federal requirements for the reduction of infiltration from surface water that could come into contact with ash under the closure cap. This advanced geomembrane cover system will result in a highly effective 99.8% reduction of surface water infiltration into the ash pond after closure. This 99.8% reduction of surface water infiltration (amounting to a reduction of 774 million gallons over the monitoring period) is, by design, a post-closure leachate control mechanism.

33. Section D of the Closure Plan requires Duke Energy to implement and operate an extensive post-closure monitoring network to conduct groundwater sampling for at least 30 years after the closure work is completed. If post-closure monitoring identifies any defined groundwater exceedances, then Duke Energy must conduct assessment monitoring and, if applicable, conduct corrective action in accordance with regulatory requirements. This is another mechanism to control post-closure leachate.

34. Section C.3 of the Closure Plan requires Duke Energy to correct and control any post-closure nuisance conditions, eliminate any threat to human health and the environment, and perform all appropriate remedial action. This Closure Plan provision imposes requirements to further "control" any post-closure leachate when warranted.

35. Section C.2 of Closure Plan provides that in order for Duke Energy "to be released from its post-closure monitoring requirements, the owner or operator must submit a post-

closure certification statement signed by both the owner/operator and a registered professional engineer stating that the post-closure care requirements have been met and the surface impoundments are stabilized." IDEM must review the post-closure certification, and if it is found to be deficient, require Duke Energy to address those deficiencies including but not limited to any additional monitoring beyond the 30 years already required by the Closure Plan.

36. Duke Energy Indiana LLC filed a Motion for Summary Judgment on January 29, 2021. The Indiana Department of Environmental Management (IDEM) filed its Concurrence on January 29, 2021. Petitioner filed its Motion for Summary Judgement and Brief of Hoosier Environmental Council in Response to the Motion of Duke Energy Corp. and Indiana Department of Environmental Management for Summary Judgment and In Support of Hoosier Environmental Council's Motion for Summary Judgment on March 1, 2021. Duke filed its Reply Duke Energy's Reply Brief in Support of Its Motion for Summary Judgment and Response in Opposition to HEC's Cross Motion for Summary Judgment on March 15, 2021. IDEM filed its Concurrence with Duke Energy's Reply in Support of Its Motion for Summary Judgment and Response in Opposition to HEC's Cross Motion for Summary Judgment on March 15, 2021. HEC filed its Reply in Support of Its Cross Motion for Summary Judgment on March 30, 2021. Oral argument was held on April 6, 2021.

Conclusions of Law

1. The Office of Environmental Adjudication ("OEA") has jurisdiction over the decisions of the Commissioner of the Indiana Department of Environmental Management ("IDEM") and the parties to this controversy pursuant to Ind. Code § 4-21.5-7, et seq.

2. 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. This office 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.;* I.C. 4-21.5-3-27(d). "*De novo* review" means that "all issues are to be determined anew, based solely upon the evidence adduced at that hearing and independent of any previous findings. *Grisell v. Consol. City of Indianapolis,* 425 N.E.2d 247 (Ind. Ct. App. 1981).

4. The OEA and IDEM, as state agencies, only have the authority to take those actions that are granted by the law. "An agency, however, 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." *Lee Alan Bryant Health Care Facilities, Inc. v. Hamilton,* 788 N.E.2d 495, 500 (Ind. Ct. App. 2003). IDEM can only determine whether a permit should be issued by applying the relevant statutes and regulations and may only consider those factors specified in the applicable regulations in deciding whether to issue a permit.

As the ultimate authority for the IDEM, the OEA's authority is limited by statute (I.C. §4-21.5-7-3) to determining whether the IDEM decision complies with the applicable statutes and regulations. OEA is an impartial litigation forum, not a body which formulates or advises as to public policy or regulatory content.

5. The OEA shall consider a motion for summary judgment "as would a court that is considering a motion for summary judgment filed under Trial Rule 56 of the Indiana Rules of Trial Procedure." I.C. § 4-21.5-3-23. Ind. Trial Rule 56 states, "The judgment sought shall be rendered forthwith 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 a judgment as a matter of law."

6. The Indiana Supreme Court in *Hughley v. State*, 15 N.E.3d 1000, 1003-1004 (Ind. 2014) held:

> The initial burden is on the summary-judgment movant to "demonstrate [] the absence of any genuine issue of fact as to a determinative issue," at which point the burden shifts to the non-movant to "come forward with contrary evidence" showing an issue for the trier of fact. *Williams v. Tharp*, 914 N.E.2d 756, 761 (Ind. 2009).
>
> ...
>
> We have therefore cautioned that summary judgment "is not a summary trial," id. (internal quotation marks omitted); and the Court of Appeals has often rightly observed that it "is not appropriate merely because the non-movant appears unlikely to prevail at trial." *Tucher v. Brothers Auto Salvage Yard, Inc.*, 564 N.E.2d 560, 564 (Ind. Ct. App. 1991), trans. denied; see also *LaCava v. LaCava*, 907 N.E.2d 154, 166 n.9 (Ind. Ct. App. 2009) (recognizing that the decedent's "claim should withstand summary judgment" despite counsel's "conce[ssion] . . . that he will be unlikely to prevail" at trial). In essence, Indiana consciously errs on the side of letting marginal cases proceed to trial on the merits, rather than risk short-circuiting meritorious claims.

7. The moving party carries the burden of establishing summary judgment to be appropriate. *Gibson v. Evansville Vanderburgh Building Commission, et al.*, 725 N.E.2d 949 (Ind. Ct. App. 2000). All facts and inferences must be construed, and issues of doubt resolved by the court in the fashion most favorable to the non-moving party. *City of Indianapolis v. Buschman*, 988 N.E.2d 791 (Ind. 2013) see also; *Town of Avon v. W. Cent. Conservancy Dist.*, 957 N.E.2d 598, 602 (Ind. 2011). After the burden of proof regarding summary judgment has been established by the moving party, the burden shifts to the non-moving party to demonstrate through specific evidence that there lies a genuine issue of material fact. *Bushong v. Williamson*, 790 N.E.2d 467, 474 (Ind. 2003). "[I]t is well-settled that speculation may not be used to manufacture a genuine issue of fact." *Amadio v. Ford Motor Co.*, 238 F.3d 919, 927 (7th Cir. 2001); see also *Borcky v. Maytag Corp.*, 248 F.3d 691, 695 (7th Cir. 2001) ("The mere existence of some alleged factual dispute will not defeat an otherwise properly supported motion for summary judgment . . .. Speculation

will not suffice."). Further, "Finally, we note that mere speculation cannot create questions of fact. *Briggs v. Finley*, 631 N.E.2d 959, 964-65 (Ind. Ct. App. 1994). Opinions expressing a mere possibility with regard to a hypothetical situation are insufficient to establish a genuine issue of material fact. Id. Put another way, "guesses, supposition and conjecture are not sufficient to create a genuine issue of material fact to defeat summary judgment." *Midwestern Indem. Co. v. Sys. Builders, Inc.*, 801 N.E.2d 661, 666 (Ind. Ct. App. 2004)." *Beatty v. LaFountaine*, 896 N.E.2d 16, 20 (Ind. Ct. App. 2008) "The law is well settled, neither arguments of counsel nor allegations in memoranda qualify as evidentiary materials for purposes of a motion for summary judgment." *Richards-Wilcox, Inc. v. Cummins*, 700 N.E.2d 496, 499 n.3 (Ind. Ct. App. 1998) (citing *J.A.W. v. Roberts*, 627 N.E.2d 802, 808 (Ind. Ct. App. 1994), rev"d on other grounds).

8. Each party has requested summary judgment in this matter. "The fact that both parties requested summary judgment does not alter our standard of review. Instead, we must separately consider each motion to determine whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law." *Laudig v. Marion County Bd. of Voters Registration*, 585 N.E.2d 700, 703-704, (Ind. Ct. App. 1992) see also; *Five Star Concrete, L.L.C. v. Klink, Inc.*, 693 N.E.2d 583, 585 (Ind. Ct. App. 1998).

9. If a court determines that the statute or rule is ambiguous, it may look to the agency's interpretation for evidence of the legislative intent. The Indiana Supreme Court, in *Shell Oil v. Meyer*, 705 N.E.2d 962, 976 (Ind. 1998) held, "However, administrative interpretation may provide a guide to legislative intent. "A long adhered to administrative interpretation dating from the legislative enactment, with no subsequent change having been made in the statute involved, raises a presumption of legislative acquiescence which is strongly persuasive upon the courts." *Board of Sch. Trustees v. Marion Teachers Ass'n,* 530 N.E.2d 309, 311 (Ind. Ct. App. 1988); accord *Baker v. Compton*, 247 Ind. 39, 42, 211 N.E.2d 162, 164 (1965)."

10. The Approval was issued pursuant to 329 IAC 10-9 and 40 CFR 257, Subpart D as incorporated in 329 IAC 10-9-1(c).

A. <u>Secondary Settling Pond, Coal Pile Ash Fill, Ash Pond A</u>

11. HEC initially challenged the closure plans for the Secondary Settling Pond and the Coal Pile Ash Fill. However, in the summary judgment briefing, HEC conceded that the closure plans for these units was acceptable.[4] HEC does not challenge the closure plan for Ash Pond A but does challenge the use of CCR from Ash Pond A as structural fill for the subgrade of the engineered cover system at the North Ash Pond and the Primary Pond Ash.

12. HEC has not presented any evidence to support its argument that the closure plans for the Secondary Settling Pond and the Coal Pile Ash Fill are deficient. There is no genuine dispute of material fact. Even without HEC's concession that the closure plans are

[4] Footnote 7, pg. 8, Petitioner's Motion for Summary Judgment.

appropriate, summary judgment in Duke's and IDEM's favor regarding these two ash ponds is appropriate.

13. HEC also has not produced any evidence that the specific closure plan for Ash Pond A is deficient. Therefore, there is no genuine issue of material fact regarding Ash Pond A closure plan and summary judgment in IDEM's and Duke's favor regarding Ash Pond A's closure is appropriate. However, HEC challenges whether the use of CCR from Ash Pond A constitutes a beneficial use.

14. 40 CFR 257.50(g) provides that Subpart D does not apply to practices that meet the definition of a beneficial use of CCR. Pursuant to 40 CFR 257.53, "Beneficial use of CCR" means the CCR meet all of the following conditions:

> (1) The CCR must provide a functional benefit;
> (2) The CCR must substitute for the use of a virgin material, conserving natural resources that would otherwise need to be obtained through practices, such as extraction;
> (3) The use of the CCR must meet relevant product specifications, regulatory standards or design standards when available, and when such standards are not available, the CCR is not used in excess quantities; and
> (4) When unencapsulated use of CCR involving placement on the land of 12,400 tons or more in non-roadway applications, the user must demonstrate and keep records, and provide such documentation upon request, that environmental releases to groundwater, surface water, soil and air are comparable to or lower than those from analogous products made without CCR, or that environmental releases to groundwater, surface water, soil and air will be at or below relevant regulatory and health-based benchmarks for human and ecological receptors during use.

15. HEC argues that this use of CCR constitutes "overfill". Overfill is defined in 40 CFR 257.53 as "a new CCR landfill constructed over a closed CCR surface impoundment."

16. The CCR from Ash Pond A will be used as structural fill for the subgrade of the engineered cover system at the North Ash Pond and the Primary Pond Ash. The North Ash Pond and the Primary Pond Fill Area are not new landfills. These areas have not received CCR since 1987 and are being closed. According to the plain language of 40 CFR 257.53, it is clear that the use of CCR from Ash Pond A for this purpose does not constitute overfill.

17. Further, the CCR removed from Ash Pond A will not be placed so as to come into contact with groundwater. Also, the cap will prevent infiltration of surface water and precipitation into the ash. Petitioners' concerns about the CCR becoming a source of groundwater contamination does not hold up to scrutiny and does not create a genuine issue of material fact.

18. Petitioners also cite to 40 CFR 257.101(a)(1), which states "Except as provided by paragraph (a)(3) of this section, as soon as technically feasible, but not later than April

11, 2021, an owner or operator of an existing unlined CCR surface impoundment must cease placing CCR and non-CCR wastestreams into such CCR surface impoundment and either retrofit or close the CCR unit in accordance with the requirements of § 257.102."

19. This section is not applicable because Duke stopped placing CCR in the North Ash Pond and the Primary Pond Ash Fill in 1987 and is seeking to close these CCR units.

20. There is no genuine issue of material fact in this matter. The closure plans for the Secondary Settling Pond, the Coal Pile Ash Fill and Ash Pond A meet all applicable requirements. Further, there is no genuine issue of material fact that the use of the CCR as subgrade for the cap constitutes a beneficial use. Summary judgment in Duke's and IDEM's favor as to this portion of the Partial Approval is appropriate.

B. North Ash Pond and Primary Ash Fill Pond

1. IDEM was correct in determining that the North Ash Pond and Primary Ash Fill Pond were not subject to the Federal CCR Rule.

21. IDEM has determined that the North Ash Pond and Primary Ash Fill Pond are not subject to the Federal CCR rule, but are governed by, and must be closed pursuant to, IDEM state rules and guidance.

22. There is no question of fact that the North Ash Pond and Primary Ash Fill Pond are distinct ponds separate from the Primary Pond. Neither received CCR or impounded water after 1987.

23. The federal rule applies to:

    (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.

    40 CFR 257.50

24. The rule gives the owner or operator of a CCR unit the option of closing in place or removing the CCR. 80 FR 21305.

25. It is clear that groundwater contamination is one of the factors behind the promulgation of this rule. The rule is specifically written to, among other things, address groundwater contamination from the improper management of CCR in landfills. 80 FR 21303. *See also*, the liner design criteria are designed to "help prevent contaminants in CCR from leaching from the CCR unit and contaminating groundwater". 80 FR 21304.

26. Duke contends that North Ash Pond and the Primary Ash Fill Pond are not subject to the Federal CCR Rule because the surface water was drained, and soil and grass were placed on top prior to 1987. HEC contends that they are subject to the rule because the CCR sits in groundwater and is subject to infiltration from the Ohio River.

27. Not all impoundments are regulated by the Federal CCR Rule. Rather, the Federal CCR Rule targets the regulation of only certain types of impoundments.

28. "CCR surface impoundment" or impoundment means 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 CFR 257.53. In order for a surface impoundment to be subject to the Federal CCR Rule, it must "hold an accumulation of CCR and liquids" as of the Rule's effective date of October 19, 2015. 40 C.F.R. § 257.53 (defining surface impoundment).

29. EPA statements are illustrative of what this phrase means and what impoundments were intended to be regulated under the Federal CCR Rule. For example, EPA indicated that the Federal CCR Rule only targets the regulation of units "that contain a large amount of CCR managed with water, under a hydraulic head, that promotes the rapid leaching of contaminants." 80 Fed. Reg at 21,342.

30. According to the preamble of the Federal CCR Rule, EPA considers surface impoundments that no longer held free liquids and were covered with soil before the Federal CCR Rule's effective date to be initially "closed" and did not require them to "reclose" under the new federal standards. See 80 Fed. Reg. 21,301, 21,343 ("By contrast, a 'closed' surface impoundment would no longer contain water, although it may continue to contain CCR (or other wastes) and would be capped or otherwise maintained."). Further, in the preamble to the Federal CCR Rule, EPA explicitly confirms that, "the final rule does not impose any requirements on any CCR surface impoundments that have in fact 'closed' before the rule's effective date—i.e., those that no longer contain water and can no longer impound liquid." Id.

31. EPA also stated, "CCR surface impoundments that have been dewatered and are no longer able to hold free liquids" and have "a soil, concrete, asphalt, or similar cover" before the Rule's effective date of October 19, 2015, "are not subject to [the Federal] regulations for CCR surface impoundments." See EPA, Vol. 3 (Scope and Purpose, Effective Dates, Applicability, Off-site Disposal & Definitions), Comment Summary and Response Document, at 74 (Dec. 2014) (emphasis added); see also 40 C.F.R. § 257.53.

32. The term "free liquids" is not a new term under RCRA and the Federal CCR Rule. EPA intentionally used the same definition of "free liquids" that is used in EPA's existing hazardous waste rules, such as the commonly used paint filter liquids test (EPA Method 9095B). This is a routine EPA test method for hazardous waste "used to determine the presence of free liquids in a representative sample of waste." EPA Method 9095B, Paint Filter Liquids Test (Rev. 2, Nov. 2004) (emphasis added).

33. EPA states that groundwater, and for that matter, any environmental medium containing contaminants, is not a solid waste in the first place. Therefore, because groundwater is not a solid waste, it is axiomatic that groundwater does not, and cannot, constitute a "free liquid" under RCRA. 40 C.F.R. § 257.53.

34. This legal conclusion is also confirmed by the language in the Federal CCR Rule itself, which defines "groundwater" as "water below the land surface in a zone of saturation." On the other hand, the Federal CCR Rule (like the paint filter liquids test) defines "free liquids" to mean "liquids that readily separate from the solid portion of a waste under ambient temperature and pressure." Id.

35. Consequently, for present purposes, "free liquids" in the Federal CCR Rule consists of the water that separates from sluiced ash and forms the surface water in an ash pond.

36. With respect to the North Ash Pond and Primary Pond Ash Fill, there were not any free liquids present when the Federal CCR Rule became effective. Moreover, there were no liquids or free liquids being "held" in or by those impoundments. The opposite is true, since groundwater at the site laterally flows to the Ohio River. Likewise, those impoundments did not have hydraulic head pressure (since they had been dewatered over thirty years ago).

37. As a result, the closures of the North Ash Pond and Primary Pond Ash Fill are governed by Indiana's established closure regulations; they are not governed by the Federal CCR Rule, which applies to other types of impoundments.

38. HEC attempts to escape this legal conclusion by asserting that: (a) groundwater freely flows underneath the site's impoundments; and (b) because a subsequently re-purposed portion of the Original Ash Pond (the "Primary Pond") is subject to the CCR Rule since it was actively being used in 2015, then the former North Ash Pond and Primary Pond Ash Fill (that were formerly in the footprint of the Original Ash Pond) must also somehow be subject to the Federal CCR Rule. These assertions are legally unavailing because an impoundment's regulatory status over three decades ago is not relevant to determining whether it is currently subject to the Federal CCR Rule. Likewise, EPA rejects any notion that potential groundwater interactions under or between impoundments have any relevance to defining the boundaries of a unit subject to the Federal CCR Rule.

39. As such, IDEM correctly applied its well-established state law regulations and requirements in its evaluation of the proposed Closure Plan for the North Ash Pond and Primary Pond Ash Fill.

40. EPA observed, "As noted, EPA's risk assessment shows that the highest risks are associated with CCR surface impoundments due to the hydraulic head imposed by impounded water. Dewatered CCR surface impoundments will no longer be subjected to hydraulic head so the risk of releases, including the risk that the unit will leach into the groundwater, would be no greater than those from CCR landfills." 80 FR 21342.

41. Inactive CCR surface impoundments are subject to all of the requirements of this subpart applicable to existing CCR surface impoundments. 40 CFR 257.10. The US EPA stated that "the risks associated with inactive CCR surface impoundments do not differ significantly from the risks associated with active CCR surface impoundments; much of the risk from these units is driven by the hydraulic head imposed by impounded units." 80 FR 21342.

42. As defined in 40 CFR 257.53, "Inactive CCR surface impoundment" means a "CCR surface impoundment that no longer receives CCR on or after October 19, 2015 and still contains both CCR and liquids on or after October 19, 2015.

43. EPA explains, ""Inactive" surface impoundments are those that contain both CCR and water, but no longer receive additional wastes. By contrast, a "closed" surface impoundment would no longer contain water, although it may continue to contain CCR (or other wastes) and would be capped or otherwise maintained." 80 FR 21302, 21343.

44. It is clear from the definition; the North Ash Pond and the Primary Ash Fill Pond are not inactive CCR surface impoundments as neither received CCR after 1987 and neither impounded water after this year.

2. IDEM properly applied the requirements of 329 IAC to the North Ash Pond and Primary Fill Ash Pond.

45. 329 IAC 10-3-1 excludes certain solid waste management activities from Article 10. Subsection (9) states that:

> Except as provided in 329 IAC 10-9-1, coal combustion residuals impoundments subject to 40 CFR 257, Subpart D, the operation of surface impoundments; however, the final disposal of solid waste in surface impoundments at the end of their operation is subject to approval by the commissioner except as excluded under subdivisions (8) and (10). The commissioner's approval is based on management practices that are protective of human health and the environment.

46. 329 IAC 10-30-1 requires that the closure of a Restricted Waste Type I or II meet certain performance standards. These standards are:

> (1) minimizes the need for further maintenance;

(2) controls post-closure escape of waste, waste constituents, leachate, contaminated precipitation, or waste decomposition products to the ground or surface waters or the atmosphere; and
(3) at a minimum, is in compliance with applicable closure provisions and conditions imposed in the facility permit.

47. HEC alleges that the plans do not meet the standard because the plans do not control post-closure leachate because the groundwater is in contact with the CCR and will become contaminated and flow to the Ohio River.

48. Duke argues that HEC only speculates as to the harm to human health and the environment. OEA has decided frequently that speculation that a permittee will not comply with the terms and conditions of a permit does not provide sufficient basis for the revocation of a permit. OEA presumes that a permittee will comply with the permit. In this case, HEC is not alleging that Duke will not comply with the permit. HEC is alleging that there was not sufficient information available for IDEM to determine that this permit will protect human health and the environment. HEC presents evidence, namely in the form of expert testimony, relating to groundwater sampling done by Duke as the basis for its assertion that the closure is not protective of human health and the environment. The experts presented by HEC, while certainly qualified and credible, did not visit the Station or gather data. Dr. Indra Frank[5] offers her opinion of the deleterious effects of various pollutants associated with CCR. However, she only speculates that certain of these pollutants are present. This is the type of speculation that is insufficient to overcome the evidence provided by Duke regarding the contaminants present at the Station. Likewise, the opinion of Greg Bright[6] is speculative as to whether the groundwater flowing into the Ohio River is contaminated above the applicable standards. Speculation as to the potential to accumulate in sediments and the harm to human health from bioaccumulation in fish is certainly founded in science but if it cannot be traced specifically to the Station, it does not create an issue of fact.

49. Duke asserts that the exceedances in groundwater on site are not indicative of whether the closure plan is protective of human health and the environment because closure is not complete. The true test will be the groundwater levels after the closure (removal of ash and construction of the cap) has been implemented.

50. The Closure Plan incorporates requirements set forth in Indiana's solid waste management regulations related to the in-place closure of Type I and Type II non-municipal solid waste landfills. These provisions include requirements involving the impoundment's engineered cover system, minimum berm elevation, engineering design and stability, drainage, and maintenance.

51. The closure plans for these units require an engineered cover system which will reduce infiltration of surface water. Duke argues that this meets the standard for "control". The

[5] Dr. Indra Frank, MD, Master of Public Health, Director of Environmental Health and Water Quality, Hoosier Environmental Council.
[6] Greg Bright, Qualified Environmental Professional.

cap is intended to meet requirements of 40 CFR 102(d)(2) by stopping infiltration. There is no genuine issue of material fact that the cap exceeds the standards and will stop infiltration.

52. The closure plans also require post-closure monitoring. If sampling discloses exceedances of groundwater limits, Duke must undertake assessment monitoring and, if necessary, corrective action.

53. In addition to the requirements above, the Closure Plan also imposes ongoing requirements in accordance with 40 C.F.R. § 257.102(d) and 329 IAC 10 to minimize the need for maintenance of the engineered cover system.

54. If monitoring well sampling or other conditions warrant, IDEM can require additional wells to be added to the Monitoring Well Network.

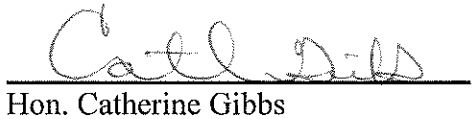
55. The Station's final groundwater monitoring system, as dictated by the Closure Plan and the approved Monitoring Well Work Plan, is consistent with the requirements imposed by 329 IAC 10-15-5(7).

Final Order

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that no genuine issues of material fact exist, and summary judgment is appropriate. Judgment is entered in favor of Duke Energy Indiana LLC and the Indiana Department of Environmental Management. The Petition for Review is dismissed. All further proceedings are vacated.

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 4th day of May 2021 in Indianapolis, IN.



Hon. Catherine Gibbs
Environmental Law Judge

DISTRIBUTION via email

Kyle Burns, Esq.
Clark Kirkman, Esq.

Office of Legal Counsel
Indiana Department of Environmental Management
Indiana Government Center North, Room 1307
100 North Senate Avenue
Indianapolis, IN 46204
kburns@idem.in.gov
ckirkman@idem.in.gov

Kim Ferraro, Esq.
Hoosier Environmental Council
541 South Lake Street
Gary, IN 46403
kferraro@hecweb.org

Albert Ettinger, Esq.
53 W. Jackson #1664
Chicago, IL 60604
Personally Indentifiable Information

Scott R. Alexander, Atty. No. 16345-49
R. William Gardner, Atty. No. 30634-49
Taft Stettinius & Hollister LLP
One Indiana Square, Suite 3500
Indianapolis, IN 46204
salexander@taftlaw.com
wgardner@taftlaw.com

Julie Ezell, Esq.
Duke Energy Indiana LLC
1000 E. Main Street
Plainfield, IN 46168
julie.ezell@duke-energy.com