OBJECTION TO THE ISSUANCE OF
HAZARDOUS WASTE MANAGEMENT OPERATING PERMIT RENEWAL
HW PROGRAM ID: IND006050967
EVONIK CORPORATION
LAFAYETTE, TIPPECANOE COUNTY, INDIANA
2025 OALP 001, OALP CAUSE NO.: IDEM-2311-003006

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	329 IAC 3.1-13
	329 IAC 3.1-4-1(a)
	329 IAC 3.1-9
	329 IAC 3.1-9-1(a)
	Ind. T.R. 56(C)
	RCRA § 3005(c)(3)
	Sections 3013 and/or Section 7003 Resource Conservation and Recovery Act (RCRA),
	Superfund Amendments and Reauthorization Act of 1986 (42 U.S.C. 9601(a))
	42 USC 9606(a)
	42 USC 6925(c)(3)
	42 USC 6926(g)
	42 USC 6934
	42 USC 6973
	Section 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980
	40 CFR 260.10
	40 CFR 264.101
	40 CFR 264.196
	40 CFR 270.30(1) and (2)
	40 CFR 270.32
	40 CFR 270.41
	40 CFR 270.42
	IC 13-12-3-2(a)
	IC § 13-13, *et seq*.
	IC 13-14-1-11.5
	IC 13-15-6
	IC § 4-21.5-3-14(c)
	IC § 4-21.5-3-23
	IC § 4-21.5-3-27(d)

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Topics/Keywords, cont.:	IC 13-25-5-8.5
	Pharmaceutical- derived hazardous wastes
	Corrective actions
	Areas of concern
Presiding ALJ:	Lori Kyle Endris
Party Representatives:	*Permittee/Petitioner:* David L. Hatchett, Esq.
	Permittee/Petitioner: Thomas W. Baker, Esq.
	Respondent: Julie Lang, Esq.
Date of Order:	January 3, 2025
Index Category:	Land
Further Case Activity:	February 2, 2025: Verified Petition for Judicial Review filed in Marion County Superior Court 6. *Evonik Corporation v. Indiana Department of Environmental Management, 49D06-2502-CT-005671.* March 4, 2025 Edited to remove signature line and distribution list.

ISSUED: January 3, 2025	**STATE OF INDIANA** **OFFICE OF ADMINISTRATIVE LAW PROCEEDINGS**
EVONIK CORPORATION, **Permittee/Petitioner,** **v.** INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, **Respondent.**	**Administrative Case Number:** IDEM-2311-003006 OEA 23-S-J-5269 **Agency Number:** HW PROGRAM ID: IND006050967

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER AS TO CONDITIONS I.A., I.D.11.a., I.H.12., II.L.6., III.E., V.G.1.b., VII, VII.B.1.a., VII.D.5.b., VII.D.7.a., VII.F., and Related Permit Terms

The Administrative Law Judge (ALJ) having considered the pleadings now issues this Final Order addressing the Indiana Department of Environmental Management's (IDEM) issuance of a Hazardous Waste Management Permit No. IND006050967 (Permit) to Permittee Evonik Corporation (Evonik).

Jurisdiction

The ALJ assigned to this matter by the Director of the Office of Administrative Law Proceedings (OALP), *see* Ind. Code § 4-15-10.5-13, has jurisdiction over this case pursuant to IC § 4-15-10.5-12, which gives OALP jurisdiction over agency administrative actions subject to the Indiana Administrative Orders and Procedures Act at Indiana Code Art. 4-21.5 (AOPA) or "any other statute that requires or allows the office to take action."

Issues

Evonik contends that certain conditions in the Permit are arbitrary, capricious, an abuse of discretion or otherwise not in accordance with applicable law. Specifically, the Permit conditions raised are as follows:

Appeal Paragraph No.	Permit Condition No.	Permit Condition Topic
6	I.A.	Permit shield
7	I.D.11.a.	Rule wording
8	I.H.12.	Document maintained
9	II.L.6.	Closure permit modification
10	III.E.	Compliance with future requirements
11	V.A.	Tank identification numbers
12	V.G.1.b.	Tank release language
13	VII.	All corrective action
14	VII.A.1.	Area of concern; R2
15	VII.B.1.a	Area of concern
16	VII.D.5.b.	Remedy section and factors
17	VII.D.6.	Corrective action permit modification
18	VII.D.7.a.	Remedy Selection
19	VII.F.	Corrective action schedule
20	Attachment D	Completeness of attachment
21	Related permit terms	Related permit terms

Procedural History

1. On November 15, 2023, Evonik timely filed its Petition for Administrative Review (Petition) objecting to certain Permit Conditions. Although Evonik's request for administrative review requested a stay.[1] Evonik did not pursue it; thus, no stay has been granted.

2. On June 19, 2024, IDEM filed a Motion for Summary Judgment along with its Memorandum in Support (IDEM Memo). IDEM moved for Summary Judgment on all appealed conditions specified in Evonik's Petition.

3. On June 21, 2024, Evonik filed a Motion for Partial Summary Judgment along with its Memorandum in Support (Evonik Memo).

4. On July 18, 2024, IDEM filed a Response to Evonik's Motion for Partial Summary Judgment (IDEM Response).

5. On July 22, 2024, Evonik filed a Response to IDEM's Motion and incorporated by reference its Motion for Partial Summary Judgment, supporting Memorandum and its designation of evidence(Evonik Response).

[1] Petition, pp. 1, 6 and 7.

6. On August 5, 2024, Evonik filed a Reply to its Motion (Evonik Reply).

7. On August 6, 2024, IDEM filed a Reply to its Motion (IDEM Reply).

8. Oral argument regarding the Motions, Responses and Replies was held October 3, 2024.

Findings of Fact

1. IDEM is authorized to implement and enforce specified Indiana environmental laws, and rules promulgated relevant to those laws. IC § 13-13, *et seq*.

2. IDEM is authorized to determine whether a permit should be issued by applying the relevant statutes and regulations and can only consider the relevant statutes and regulations when issuing the permit. *Page Road*, 2022 OEA 150, 152; *Wolf Lake*, 2023 OEA 001, 006; *American Suburban Utilities*, 2019 OEA 48, 53.

3. Evonik is the owner and operator of a hazardous waste facility that utilizes tank and container storage for hazardous waste.[2] Evonik also utilizes an incinerator for hazardous waste treatment purposes.[3] Evonik's utilization requires a hazardous waste management permit.

4. IDEM issued the Hazardous Waste Management Renewal Permit (Permit), EPA ID No. IND006050967 on October 31, 2023.[4]

5. Corrective action is being undertaken by Eli Lilly and Company (Eli Lilly) via an Agreed Order dated December 14, 2009, and neither the Order nor Eli Lilly's corrective action is part of Evonik's Permit.

Conclusions of Law

1. IC § 4-15-10.5-12 gives OALP jurisdiction over agency administrative actions subject to the Indiana Administrative Orders and Procedures Act at Indiana Code Art. 4-21.5 (AOPA) or "any other statute that requires or allows the office to take action."

2. This is a Final Order issued under 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

[2] Permit, p. 3.
[3] *Id*.
[4] VFC Doc. No. 83552595.

findings of fact are so deemed.

3. OALP must apply a de novo standard of review 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 ALJ, and deference to the agency's initial factual determination is not allowed.[5] Pursuant to IC § 4-21.5-3-23, an ALJ shall consider a summary judgment motion as would a court that is considering a motion for summary judgment filed under Trial Rule 56 of the Indiana Rules of Trial Procedure.

4. The Court may enter summary judgment for a party if it finds that "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 moving party bears the burden of establishing that summary judgment is appropriate. All facts and inferences must be construed in favor of the non-movant, and all doubts as to the existence of a material issue must be resolved against the moving party. G*ibson v. Evansville Vanderburgh Building Commission, et al*., 725 N.E.2d 949 (Ind. Ct. App. 2000); *City of North Vernon v. Jennings Northwest Regional Utilities,* 829 N.E.2d 1, (Ind. 2005); *Tibbs v. Huber, Hunt & Nichols, Inc*., 668 N.E.2d 248, 249 (Ind. 1996).

5. The fact that both parties requested summary judgment does not alter the standard of review. Instead, the Court 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). Here, each party has the burden of showing whether IDEM's decision to issue the Permit either complied with or was contrary to law or is somehow deficient to require revocation, as a matter of law. *In the matter of Objection to the Issuance of the Permit. Aquasource Services and Technology*, 2002 OEA 41. Each movant has the burden of proof, persuasion and of going forward on its motion for summary judgment. [7]

6. A party opposing summary judgment must present specific facts demonstrating a genuine issue for trial. *Hale v. Community Hospitals of Indianapolis*, 567 N.E.2d 842, 843 (Ind. Ct. App. 1991). When a motion for summary judgment is made, an adverse party may not rest upon the mere allegations or denials of their pleading but must set forth specific facts showing that there is a genuine issue for trial. *Williams v. Tharp*, 914 N.E.2d 756 (Ind. 2009). Summary judgment shall be rendered 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. [8]

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[5] *Id*.; IC § 4-21.5-3-27(d).
[6] Ind. Tr. R. 56(C); IC § 4-21.5-3-23.
[7] IC § 4-21.5-3-14(c).
[8] Ind. T.R. 56(C).

7. OALP's review is limited to determining whether IDEM complied with applicable statutes and regulations pertaining to permits when it issued the Permit. *Berkshire Pointe WWTP*, 2023 OEA 105, 110; *Blue River Valley*, 2005 OEA 1, 11. OALP's jurisdiction is limited to and cannot be extended beyond those matters over which the General Assembly has determined that it may exert subject matter jurisdiction.

8. IC 13-15-6-requires a request for adjudicatory hearing regarding a permit to state with particularity the issues proposed for consideration at the hearing and identify the permit terms and conditions that, in the judgment of the person making the request, would be appropriate in the case in question to satisfy the requirements of the law governing permits of the type granted or denied by the commissioner's action. In addition to the requirements under IC 13-15-6, 315 IAC 1-3-2(b)(4) requires a petitioner to include the permit terms and conditions that it contends would be appropriate.

Condition I.A. – Effect of Permit.

9. Evonik contends "there is no legal authority to deny legal protections related to the permit."[9] Specifically, Evonik contends the language of this paragraph "unnecessarily limits the scope of regulatory protection provided by compliance with the Permit."[10] Condition I.A. states:

> Compliance with the terms of this permit does not constitute a defense to any Order issued or any action brought under Section 3013 or Section 7003 of RCRA; Section 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601), commonly known as CERCLA, as amended by the Superfund Amendments and Reauthorization Act of 1986 (42 U.S.C. 9601(a)), commonly known as SARA, or any other law providing for protection of public health or the environment.[11]

The Resource Conservation and Recovery Act (RCRA)[12] is an enforceable federal statute that states EPA maintains authority under RCRA notwithstanding EPA's delegation to Indiana to undertake hazardous waste permitting.[13] Section 106(a) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) is a federally enforceable statute that is not limited by Indiana's authorization under RCRA.[14]

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[9] Petition, p. 2.
[10] Evonik Memo, p 13.
[11] 329 IAC 3.1-13; 40 CFR 270.4; IC 13; Permit, p. 9.
[12] 42 USC 6934 and 42 USC 6973.
[13] *See* RCRA Sections 3013 and 7003; https://www.govinfo.gov/content/pkg/FR-2020-05-06/pdf/2020-09548.pdf.
[14] 42 USC 9606(a) (noting that action may be taken under this provision "in addition to any other action taken by a State or local government").

Evonik has not shown this condition involves a misstatement of law or exceeds IDEM's authority of any "other law providing for protection of public health or the environment"[15] outside of RCRA or CERCLA for which compliance with its Permit would shield it against enforcement; thus, Evonik has not met its burden of proof as required by IC 4-21.5-3-14(c). Condition 1.A. is upheld.

Condition I.D.11. – Certification of Construction or Modification.

10. Evonik contends "[t]his [Condition] incorrectly recites the requirements of applicable rules" and "requests that items (a) and (b) be renumbered to items (a)(1) and (a)(2) in addition to renumbering the third paragraph to become item (b)."[16] The Condition reads:

> The Permittee may not treat, store or dispose of hazardous waste in a modified portion of the facility, except as provided in 40 CFR 270.42 until:
>
> a. The Permittee has submitted to the Commissioner by certified mail, hand delivery, or electronically via IDEM's Hazardous Waste Permit SharePoint Portal a letter signed by the Permittee and a qualified professional engineer stating that the facility has been constructed or modified in compliance with the permit;[17] and
>
> b. The Commissioner has inspected the modified or newly constructed facility and finds it is in compliance with the conditions of the permit; or
>
> Within 15 days of the date of submission of the letter described in I.D.11.a., the Permittee has not received notice from the Commissioner of his or her intent to inspect, prior inspection is waived, and the Permittee may commence treatment, storage or disposal of hazardous waste.[18]

Evonik did not elucidate which incorrect recitation of applicable rules this Condition allegedly contains, did not state with particularity the legal issues proposed or considered, environmental concerns or technical deficiencies, and did not provide the permit terms and conditions that would be appropriate to comply with "applicable rules" as required by with IC § 13-15-6 or 315 IAC 1-3-2(b)(4). Evonik has not met its burden of proof as required by IC § 4-21.5-3-14(c). Moreover, the federal regulation on which this Condition is based, 40 CFR 270.30(1) and (2), is required to be included in the Permit by 329 IAC 3.1-13. Lastly, there exists no requirement appearing in either 40 CFR 270.30 or 329 IAC 3.1-13 for IDEM to utilize specific numbering in its permit. Condition I.D.11. is upheld.

[15] Petition, p. 2; Evonik Memo, p. 13.
[16] Petition, p. 2.
[17] 329 IAC 3.1-13; 40 CFR 270.30(1)(2)(ii)(A).
[18] 329 IAC 3.1-13; 40 CFR 270.30(1)(2)(ii)(B); Permit, p. 13.

Condition I.H.12. – Documents to be Maintained.

11. Evonik contends this paragraph "should be revised to limit the records that are required to be maintained to those created by the Permittee."[19] Evonik states, "[a] third party is conducting corrective action at the facility" and opines "Evonik should not be required to maintain records that it did not create."[20] IDEM moved for summary judgment regarding Condition I.H.12., but Evonik did not. The Condition reads:

> Except as noted in the regulations, until closure is completed and certified by the owner/operator and a qualified professional engineer, the Permittee must maintain at the facility the most recent version of the following documents *required by this permit*. (emphasis added).
>
> Corrective Action reports and records as required by Permit Conditions VII, of this permit, maintained for at least 3 years after all Corrective Action Activities have been completed . . .[21]

The responsibility for any "documents to be maintained at [the] facility site" falls solely to Evonik under the requirements of Permit IND006050967 and not the corrective action Eli Lilly is required to complete pursuant to its December 14, 2009, Agreed Order.[22] As the Condition does not require Evonik to maintain a third party's records and the Agreed Order is not part of Permit IND006050967, Evonik's contention is without merit. Condition I.H.12. is upheld.

Condition II.L.6. – Certification of Closure.

12. In its Petition, Evonik contends that the second paragraph of Condition II.L.6. creates an unnecessary administrative burden and its inclusion exceeds IDEM's legal authority.[23] In its Response, Evonik states, "the requirement to apply for a permit is unsupported by any legal basis because 40 CFR 270.42 only addresses 'permit modification at the request of IDEM.'"[24] Notwithstanding that 40 CFR 270.42 is titled "permit modification at the request of the permittee," the rule requires a permittee to modify its permit when a partial closure occurs at a facility.[25]

Evonik utilizes two types of management units (containers and tanks) for hazardous waste storage purposes. The Permit specifically lists the hazardous waste management units,

[19] Petition, p. 2.
[20] *Id*.
[21] *Id.,* pp. 15 – 16.
[22] *Id.*, p. 33.
[23] Petition, p. 3; Evonik Memo, p. 14.
[24] Evonik Response, p. 10.
[25] 40 CFR 270.42, Appendix I, F. and G.

the volumes of waste held and/or contained[26] and their locations.[27] 40 CFR 260.10 defines "partial closure" as "the closure of a hazardous waste management unit in accordance with the applicable closure requirements of parts 264 and 265 of this chapter at a facility that contains other active hazardous waste management units."[28] Paragraph 2 of the Permit states:

> For a partial closure, the *Permittee shall submit* a permit modification in accordance with 40 CFR 270.42 no later than 45 days after certification approval. The modification shall either remove the unit from service, replace the unit, propose new unit to be permitted, or requests to the Commissioner that a time extension to submit the permit modification be granted for good cause.[29] (Emphasis added).

When a permittee closes a unit, the unit, its location and the volume of waste contained must be removed from the Permit's list of permitted units and corresponding volumes to ensure the accuracy of the Permit. These partial closures are subject to the requirements of a Class 1 modification according to IDEM's incorporated federal rule.[30] Changes to container or tank units and unit replacement necessitate a Class 1 modification. Partial closure and/or replacement or relocation of a unit *requires* a permittee to submit an application for a modification; thus, the language in the Condition does not exceed IDEM's legal authority, and it has not created an administrative burden by incorporating federal and state requirements.

Evonik's contention is without merit. Condition II.L.6. is upheld.

Condition III.E. – Duty to Comply with Future Requirements.

13. Evonik contends "[t]his condition purports to require compliance with 'future air regulations promulgated by RCRA'. However, such rules are only applicable to Indiana entities when promulgated by the Indiana Environmental Rules Board."[31] The Condition reads:

> The Permittee must comply with all self-implementing provisions of any future air regulations *promulgated by RCRA as amended by HSWA*.[32]
> (emphasis added).

As an authorized State under RCRA, Indiana can implement and enforce its own state-based hazardous waste management program in lieu of the federal RCRA program. In general,

[26] Permit, pp. 2-3.
[27] *Id*.
[28] 40 CFR 260.10 is incorporated into 329 IAC 3.1-4-1(a).
[29] Permit, p. 20.
[30] 329 IAC 3.1-13-7 (Permits may only be modified for the reasons specified in 40 CFR 270.41 through 40 CFR 270.43, and IDEM is required to use 40 CFR 270.42 when a permittee initiates modifications).
[31] Petition, p. 3.
[32] Permit, p. 22.

when federal rules were passed under pre-1984 RCRA 1984, the rules do not apply in authorized states until the state specifically incorporates them into the state by reference or by specific language in a state rule. Regulations under1984 HSWA amendments apply to all regulated hazardous waste management facilities nationwide until a state is delegated the authority to include the requires in their state program.[33]

The language in the Condition clearly states that it applies only to "self-implementing provisions … promulgated by RCRA, as amended by HSWA" which merely echos 42 USC 6926(g) which provides notice that certain federal regulations may apply even if IDEM has not yet officially incorporated them into state law. Indiana is an authorized state, and regulations promulgated un the HSWA 1984 Amendments. Regulations promulgated under the Amendments apply to all regulated hazardous waste management facilities until a state is delegated the authority to include such requirements in their state.[34]

The Condition's language clearly states that it applies only to "self-implementing provisions . . . promulgated under RCRA as amended by HSWA" thereby following 42 USC 6926(g) and providing notice to a permittee that certain federal regulations apply even if IDEM has not yet incorporated federal regulations into state law. Evonik's contention that the Condition is not permissible because the requirement to comply with future air regulations has not been adopted into 329 IAC is without merit. Condition III.E. is upheld.

Condition V.A. – Tank Storage Conditions / Waste Identification.

14. Evonik contends the tank identification numbers referenced in the Permit, TK-3127 and TK-3128 are incorrect.[35] Notwithstanding that Evonik provided these exact numbers to IDEM with its renewal application and provided no comment on this Condition during the permit comment period, IDEM does not object to remand of this Condition to replace the numbers with the correct ones, TK-3227 and T-3228.[36] Condition V.A. is remanded to IDEM to correct the tank numbers. The remainder of Condition V.A. is upheld.

Condition V.G.1.b. - Containment and Detection of Releases.

15. Evonik contends *Condition V.G.1.b*. "incorrectly restates applicable regulations and impermissibly expands the conditions under which a hazardous waste tank must be taken out of service" and requests the phrase "[I]f the release was from the tank system, the Permittee must" be added to the beginning of the condition.[37] (Emphasis added). The

[33] 42 USC 6926(g) ((stating any requirement imposed under HSWA takes effect in authorized states on the same day it takes effect in other states).
[34] *Id.*
[35] Petition, p. 3.
[36] IDEM Motion for Summary Judgment, p. 12 F. *See also*, Petition, p. 3.
[37] Petition, p. 3.

Condition reads:

1. To prevent the release of hazardous waste or hazardous constituents to the environment, the Permittee must provide secondary containment as specified in the Tank Storage Plan, Attachment D, which is incorporated herein by reference. 329 IAC 3.1-9; 40 CFR 264.193

2. In the event of a leak or a spill from the tank system, from a secondary containment system, or if a system becomes unfit for continued use, the Permittee must remove the system from service immediately and complete the following actions (329 IAC 3.1-9; 40 CFR 264.196):

a. Stop the flow of hazardous waste into the system and inspect the system to determine the cause of the release.

b. Remove waste from the system within 24 hours of the detection of the leak to prevent further release and to allow inspection and repair of the system. If the Permittee finds that it will be impossible to meet this period, notify the Commissioner and demonstrate that a longer time is required. If the collected material is a hazardous waste, it must be managed in accordance with all applicable requirements. The Permittee must note that if the collected material is discharged through a point source to U.S. waters or to a POTW, it is subject to requirements of the Clean Water Act. If the collected material is released to the environment, it may be subject to reporting under 40 CFR Part 302.

c. Contain visible releases to the environment. The Permittee must immediately conduct a visual inspection of all releases to the environment and based on that inspection: (1) prevent further migration of the leak or spill to soils or surface water and (2) remove and properly dispose of any visible contamination of the soil or surface water.

d. Close the system in accordance with the Closure Plan, Permit Attachment l, unless the following actions are taken:

For a release caused by a spill that has not damaged the integrity of the system, the Permittee must remove the released waste and make any necessary repairs to fully restore integrity of the system before returning the tank system to service.

For a release caused by a leak from the primary tank system to the secondary containment system, the Permittee must repair the primary system prior to returning it to service.

e. For all major repairs to eliminate leaks or restore the integrity of the tank system, the Permittee must obtain a certification by a registered professional engineer that the repaired system is capable of handling hazardous wastes without release for the intended life of the system before returning the system to service. Examples of major repairs are installation of an internal liner, repair of a ruptured tank, or repair or replacement of a secondary containment vault.[38]

Notwithstanding there exists no Condition V.G.1.b., and Evonik's Petition did not raise V.G.2.b. thereby waiving its objection, the Condition addresses both tank systems and secondary containment systems as does the rule the Condition is based upon: 40 CFR 264.196. Evonik requests that subsection b. only be applied to tank systems, but Evonik's request does not comply with 40 CFR 264.196. Condition V.G.1.b. is upheld.

Condition VII.A.1. – Corrective Action Conditions / Standard Requirements / Corrective Actions at the Facility.

16. In its Petition Evonik contends, "IDEM lacks the legal authority to require corrective action at Areas of Concern (AOC) as defined in the permit, that the definition of AOC is broader than that allowed by law, and that IDEM may not impose corrective action obligations beyond the remediation set forth in IC § 13-25-4-8.5"[39]

Evonik contends a sentence should be added at the end of Paragraph 2:

In accordance with IC 13-12-3-2(a), the remediation and closure goals, objectives and standards for all remediation projects conducted under IC 13-22 shall be consistent with the remediation objectives set forth in IC 13-25-5-8.5. IDEM's 2022 R2 provides guidance to determine the steps necessary to control, minimize or eliminate threats to human health and the environment.

The first sentence in Evonik's request quotes two Indiana statutes, and it is unnecessary to add them here as both IC § 13-12-3-2(a)[40] and § 13-25-5-8.5[41] appear in Condition VII.D.5. which addresses the performance of a corrective measures study and remedy section under the permit.

Evonik objects "to the third paragraph because it did not identify the correct guidance

[38] Permit, pp. 28 – 29.
[39] Petition, p. 4.
[40] IC 13-12-3-2 (Remediation and Closure Goals, Objectives, and Standards).
[41] IC 13-25-5-8.5 (Outlines what a voluntary remediation work plan must specify).

and because it limited application of this guidance to 'selecting risk-based endpoints'[42] and thus should be removed in its entirety."[43] The third paragraph reads:

> 3. The Permittee may use the principles and procedures set forth in IDEM's 2012 Remediation Closure Guide, and all revisions and additions thereto as of the effective date of this permit, or other risk-based methodologies approved by IDEM's Office of Land Quality Permits Branch, as the basis for selecting risk-based endpoints that will be used for the investigations, studies, interim measures, and corrective measures under the permit. The Permittee must perform all such work in a manner consistent with, at a minimum, the Remediation Closure Guide.[44]

The 2022 R2 is the current version of remediation guidance;[45] however, other risk-based methodologies, as referenced in the current language of the Condition, may be applicable or approved. The R2 notes that "IDEM recognizes that there are many possible ways to investigate releases and evaluate and control risk, and that approaches different than those described herein may be just as or more appropriate in some situations."[46] Petitioner's proposed language would negate the now available option for permittees to propose something outside the R2 and have IDEM review that alternate proposal on its own merits. IDEM's current language provides this flexibility and therefore, is more appropriate for such guidance.

In its comment on Condition VII.A.1., Evonik included language addressing the definition of "Area of Concern" which is within Condition VII.B.1.a.[47] In its response to Evonik's comments on Condition VII.A.1., IDEM asserted that the concept of an AOC, comes from RCRA Section 3005(c) and a 1996 Advanced Notice of Proposed Rulemaking (ANPR), 61 Fed. Reg. 19443 (May 1, 1996).[48] Evonik's claim that IDEM solely relied upon the ANPR is without merit.

Evonik's insistence that IDEM's reference to its 2012 R2 constitutes a refusal to acknowledge the current remediation guidance (2022 R2) because IDEM referred to the 2012 R2 in the Condition[49] is also without merit. Condition VII.A.1.'s language reads in part,

> The Permittee *may* use the principles and procedures set forth in IDEM's 2012 Remediation Closure Guide, *and all revisions and additions thereto as of the effective date of this permit, or other risk-based methodologies approved by IDEM's Office of*

[42] Petition, p. 4; Evonik Resp, p. 6.
[43] Evonik's Memo, p. 10.; In its Motion for Summary Judgment, IDEM agreed to
[44] Permit, p. 33.
[45] Evonik's accusation is incorrect since the Permit's language accounts for such future remediation guidance revisions in referring
[46] *See* R2, p. 7.
[47] *See* Evonik Motion for Summary Judgment, Tab B, IDEM Response to Comments, p. 10.
[48] *Id.*
[49] Evonik's Memo, p. 10.

Land Quality Permits Branch, as the basis for selecting risk- based endpoints that will be used for the investigations, studies, interim measures, and corrective measures under the permit.[50] (Emphasis added).

Evonik has not provided either evidence or cogent argument showing (let alone proving) this condition is contrary to law. Notwithstanding, IDEM has agreed to revise the year of the permit-referenced R2, and this issue will be remanded for the change. The remainder of the language of Condition VII.A.1. is upheld.

Condition VII.B.1.a. – Definition of Area of Concern.

17. The Permit requires IDEM to address "Solid Waste Management Units" and "Areas of Concern. Evonik contends IDEM's version of the "the definition . . . exceeds IDEM's regulatory authority[51] and opines the definition is overly broad and "[u]nder this definition, nearly any activity at a permitted treatment, storage or disposal facility or any industrial operation for that matter, could *potentially* produce unacceptable exposures or contaminant [sic] groundwater."[52] (emphasis original). IDEM's language states:

> "Area of Concern (AOC)" means a unit or area, existing or historical that could *potentially* produce unacceptable exposure or be a *potential* source of ground water contamination, but the unit or area does not meet the definition of a solid waste management unit.[53]

Evonik does not argue the definition used by IDEM actually conflicts with any applicable statute or regulation. Evonik acknowledges "that permits 'contain such terms and conditions as the Administrator (or the State) determines necessary to protect human health and the environment' and is authorized by 42 USC 6925(c)(3) (RCRA § 3005(c)(3))"[54] but instead only argues that Evonik's proposed definition "conforms better to RCRA § 3005(c)(3)."[55] Evonik's proposed definition states:

> "Area of Concern (AOC)" means any area having a probable release of a hazardous waste or hazardous constituent which is not from a solid waste management unit and is determined by IDEM to pose a current or potential threat to human health or the environment.[56]

[50] Permit, p. 33.
[51] Petition, p. 4.
[52] Evonik Memo, pp. 11 – 12.
[53] Permit, p. 34.
[54] Evonik Memo, p. 12.
[55] The language of RCRA § 3005(c)(3) has been promulgated as 40 CFR 270.32 which has been incorporated by 329 IAC 3.1-13-2.
[56] Evonik Memo, p. 12.

Evonik cites Region 3's "RCRA Corrective Action Terms and Acronyms,"[57] in support of its definition: https://sor.epa.gov/sor_internet/registry/termreg/searchandretrieve/termsandacronyms/search.do?search=&term=area%20of%20concern&matchCriteria=Contains&checkedAcronym=true&checkedTerm=true&hasDefinitions=false. During Oral Argument Evonik stated that the language was authorized/approved by U.S. EPA and was on EPA's website. The link Evonik provided in support of this statement: https://sor.epa.gov/sor_internet/registry/termreg/searchandretrieve/glossariesandkeywordlists/search.do?details=&vocabName=RCRA%20Corrective%20Action [58] linked directly to Region 3's language and had the exact same content. Evonik did not prove that EPA presented the language as its own version or gave the definition its approval. Each Region's Administrator has the authority to make the decisions impacting his/her own states. There is no requirement for one region to adopt another's viewpoint; thus, Evonik's reliance upon Region 3's language to support its proposed language has no precedential value.

The language for IDEM's definition was properly noticed via IDEM Non-Rule Policy Document issued pursuant to IC 13-14-1-11.5. Moreover, the statute requires a Non-Rule Policy to be available for public inspection for at least forty-five (45) days prior to presentation to the appropriate State Environmental Board and may be put into effect by IDEM thirty (30) days thereafter. IDEM is also required to submit the Non-Rule to the Indiana Register for publication. All of these actions were undertaken. Evonik has failed to demonstrate the properly published Non-Rule Policy definition of Area of Concern is overbroad, exceeds IDEM's authority or is based solely on an unpromulgated rule.

As to whether the definition is overly broad, IDEM's definition of AOC is, in brief, an area "that could potentially produce unacceptable exposures or be a potential source of ground water contamination." Evonik agrees that IDEM has the authority to address AOCs, but points to the use of the word "potential" in IDEM's definition of AOC as problematic, rendering IDEM's definition overbroad. Evonik's initially proposed definition also used the word "potential" (defining an AOC as an area "determined by IDEM to pose a current or potential threat to human health and the environment"). It is axiomatic that potential exposures or potential contamination (IDEM's definition) are potential threats to human health and the environment (Evonik's definition).

The identification of sources of potential contamination help to further the statutory mandate to include conditions in a permit as necessary to protect human health and the

[57] Region 3 covers Delaware, Maryland, Pennsylvania, Virginia, West Virginia, Washington, D.C., and seven Tribal Nations. Region 5 covers Indiana.
[58] Evonik email dated October 21, 2024.

environment.[59] The purpose of RCRA, and thus IDEM's authorized state program under RCRA, is to proactively and properly manage hazardous wastes to prevent releases not to just allow such releases to occur because there are also cleanup provisions in RCRA as well.[60] Condition VII.B.1.a is upheld.

Condition VII.D.5.b. – Corrective Measures Study (CMS) Remedy Selection.

18. The CMS Remedy Selection states:

> IDEM will approve a corrective measure for implementation based on the following factors. The corrective measure selected for implementation must: (1) be protective of human health and the environment; (2) attain media cleanup standards; (3) control the source(s) of releases so as to reduce or eliminate further releases of hazardous waste(s) (including hazardous constituent(s)); (4) minimize the transfer of contamination from one environmental medium to another; and (5) comply with all applicable standards for management of wastes.
>
> If two or more of the corrective measures studied meet the threshold criteria set out above, IDEM will choose among alternatives for implementation by considering remedy selection factors including: (1) long-term reliability and effectiveness; (2) the degree to which the corrective measure will reduce the toxicity, mobility or volume; (3) the corrective measure's short-term effectiveness; (4) the corrective measure's implementability; and (5) the relative cost associated with the alternative. In selecting the corrective measure(s), IDEM may also consider such other factors as may be presented by site-specific conditions.[61]

In its Memorandum, Evonik first contends that Condition VII.D.5.b. imposes requirements for corrective action beyond what is required by Indiana law and exceeds statutory authority.[62] All the factors specified in the Condition are discussed in the R2 which was properly issued under IC 13-14-1-11.5.[63] IDEM's use of this Non-rule Policy is appropriate and legitimately considered when attempting to determine whether a remedy is appropriate for a given site.

Evonik next contends that the language allows IDEM to "reject an acceptable remedy in lieu of one that IDEM likes better."[64] The Condition unequivocally does *not* state that "IDEM will

[59] See 42 USC 6925(c)(3); (RCRA § 3005(c)(3).
[60] *See* EPA RCRA Orientation Manual at p. VI-9: https://www.epa.gov/sites/default/files/2015-07/documents/rom.pdf.
[61] Permit, p. 41.
[62] Evonik Memo, pp. 7 - 8.
[63] IDEM Motion, pp. 16 – 20.
[64] *Id*., p. 8.

reject, choose or select a remedy."[65] The Condition indicates IDEM approves remedies, and such approval is authorized by the R2.[66] If more than one remedy may be appropriate, this Condition further indicates factors which will be considered in those situations where IDEM must approve one remedy over another. This mirrors the R2's statement that IDEM does not generally choose remedies itself [67] but does have approval authority over remedies proposed by responsible parties and/or permittees.[68]

Evonik objects to factors 2, 3, and 4 relating to success in attaining media cleanup standards, controlling sources of releases so to as reduce or eliminate further releases, and minimizing transfer of contamination from one environmental medium to another.[69] The setting and attaining of media cleanup standards are fundamental requirements of IC § 13-25-5-8.5, § IC 13-12-3-2 and the R2.[70] Further, controlling sources and minimizing transfer of contamination are necessary factors to consider when approving remedies, otherwise there continually would be new releases and new exposure risks; previous work may be rendered inadequate or exacerbate a release if these factors are not taken into account. Allowing sources to continue releasing contaminants causing contamination to migrate to different media also increases costs and makes characterization of the contamination plume much more difficult for purposes of determining appropriate remedies.[71] Given that these factors are discussed are fundamental requirements of IC § 13-25-5-8.5, IC § 13-12-3-2 and R2, Evonik's claim that this Condition "imposes requirements for corrective action beyond what is required by Indiana law and IDEM's officially adopted policy"[72] is without merit.

All the factors listed in Condition VII.D.5.b. are addressed in the R2. If Evonik disagrees with IDEM's approval of a specific remedy, Evonik can, pursuant to Condition VII.E., avail itself of its dispute resolution provisions.[73] Evonik has failed to show Condition VII.D.5.b. establishes new standards, is contrary to law in allowing IDEM to approve one remedy over another remedy, or is based solely on an unpromulgated rule. Condition VII.D.5.b. is upheld.

[65] Permit, p. 41.
[66] *See* R2, p. 113 ("How IDEM Will Evaluate Remedy Selection").
[67] *Id.,* p. 108.
[68] *See* IDEM's Motion, pp. 16 – 20; 22 – 23.
[69] Evonik, Resp., pp. 6 – 8.
[70] *See* R2, p. 10, ¶ 1.3, Process Overview which describes major steps including plume characterization, the setting of remediation objectives based upon that characterization, and implementing necessary remediation to achieve those objectives.
[71] R2, p. 52, ¶ 2.3.5 "Presence of an Ongoing Source".
[72] Evonik Resp., p. 6.
[73] Permit, p. 43, Condition VII.E.5. referencing the availability of administrative review pursuant to IC 4-21.5.

Condition VII.D.6. – Permit Modification.

19. Evonik requests deletion of this condition in its entirety on the basis that "there is no legal requirement for this administrative burden."[74] IDEM argues that revision of the permit based upon approval of a corrective measure is required by applicable rules.[75] Condition VII.D.6. reads

> Within 30 days of IDEM's approval of a corrective measure, the Permittee will initiate a permit modification, pursuant to 40 CFR 270.41 or 40 CFR 270.42, respectively, for the implementation of the corrective measure(s) selected. No permit modification fees are required for any modifications submitted under this condition."[76]

IDEM contends that revision of the permit based upon approval of a corrective measure is required by applicable rules.[77] IDEM notes the addition of or changes to a corrective action program required pursuant to 40 CFR 264.99 or 40 CFR 264.100[78] are specifically identified changes that require a permittee to initiate a permit modification under 40 CFR 270.42.[79] Corrective action under a hazardous waste management permit outside that specific context is governed in part by 40 CFR 264.101, which has been incorporated by 329 IAC 3.1-9-1(a). Section 264.101 reads:

> Corrective action will be specified in the permit in accordance with this section and subpart S of this part. The permit will contain schedules of compliance for such corrective action (where such corrective action cannot be completed prior to issuance of the permit) and assurances of financial responsibility for completing such corrective action.

This language contemplates a modification of the permit to include corrective-action-related schedules of compliance and assurances of financial responsibility. Additionally, the EPA has issued a public participation manual which indicates the EPA considers corrective measure approval be subject to a 40 CFR 270.41 permit modification, which modifications are initiated by

[74] Evonik's Memo, p. 15.
[75] IDEM's Motion, pp. 21 – 22.
[76] Permit, p. 41.
[77] IDEM's Motion, pp. 21 – 22.
[78] (40 CFR 264.99 and 40 CFR 264.100 are related to groundwater monitoring related programs required for certain regulated units including landfills. These federal regulations are incorporated by 329 IAC 3.1-9-1.
[79] 40 CFR 270.42, Appendix I, at line-item C.8.

the agency[80] pursuant to its Resource Conservation and Recovery Act Public Participation Manual (2016).[81]

Evonik requests deletion of this Condition in its entirety on the basis that "IDEM lacks the authority to force a permittee to initiate a permit modification to implement corrective action and the authorities cited have no applicability to corrective action."[82] IDEM argues that it has chosen to include 40 CFR 270.42 as potential authority for such a permit modification since certain activities may require a 270.42 modification, which modification is initiated by the permittee. For example, approval of a corrective action management unit per line-item N.1. of Appendix I to 40 CFR 270.42 requires a 270.42 modification. Additionally, other modifications not specifically listed in Appendix I may require a modification pursuant to 40 CFR 270.42(d), a catch-all provision for modifications not explicitly listed in Appendix I. Thus, the permit should allow a permittee to request such a modification if required by that rule, and IDEM's requirement is supported by applicable law.

Notwithstanding, IDEM agrees that this condition could be clarified as follows:

> Within 30 days of IDEM's approval of a corrective measure, either IDEM will initiate a permit modification pursuant to 40 CFR 270.41, or Permittee will initiate a permit modification pursuant to 40 CFR 270.42, as appropriate, for the implementation of the corrective measure(s) selected. No permit modification fees are required for any modifications submitted under this condition.

Because modification of a permit in response to corrective measure approval may be required by either 40 CFR 270.41 or 40 CFR 270.42, as appropriate, the Permit is remanded to revise Condition VII.D.6. in accordance with the language above. The remaining portions of Condition VII.D.6. are withheld.

Condition VII.D.7.a. – Corrective Measures Implementation (CMI).

20. Evonik contends this Condition allows IDEM to choose the remedy.[83] Evonik requests this condition be deleted and replaced alleging that "IDEM lacks the authority to require Petitioner to accept certain corrective measures" and "the condition does not provide

[80] Modifications are governed by both 40 CFR 270.41 and 40 CFR 270.42, as incorporated by 329 IAC 3.1-13-7. The former governs modification by the agency based upon receipt of information triggering such modification (40 CFR 270.41), and the latter governs modifications at the request of the Permittee (40 CFR 270.42), depending on what activity is at issue.
[81] Manual, p. 54, https://www.epa.gov/sites/default/files/2019-09/documents/final_rcra_ppm_updated.pdf.
[82] Petition, pp. 5 – 6.
[83] Evonik's Memo, p. 7 (intro paragraph to Section III); p. 8, fn. 5

an appropriate standard by which corrective measures will be evaluated."[84] The Condition reads:

> If the corrective measure(s) recommended in the Corrective Measures Study Report is (are) not the corrective measure(s) approved by IDEM after consideration of public comments, the Section Chief will inform the Permittee in writing of the reasons for such decision. Within 30 days after the effective date of the permit modification processed under Condition VII.D.5., the Permittee must implement the corrective measure(s) in accordance with the schedule provided in the approved permit modification.[85]

As found with Condition VII.D.5.b., IDEM has approval authority over corrective measures per the R2, and Evonik has recourse should it disagree with IDEM's approval. Evonik has not shown this language exceeds applicable law or policy. Condition VII.D.7.a. is upheld.

Condition VII.F. – Corrective Action Activities Schedule for Newly Identified SWMUs.

21. In its Petition, Evonik stated "Item 12 (CMI) should be deleted to conform to the removal of the requirement for a permit modification".[86] The request to delete Item 12 is denied because the CMI is required to implement the corrective measures needed in response to a release. Thus, CMI cannot be deleted from the schedule without defeating the purpose of corrective action.

Assuming Evonik instead intended to request that Item 11 be removed (the requirement to request a permit modification related to CMI), IDEM has the authority to request a permit modification to incorporate necessary provisions regarding corrective measure approval into the Permit. Condition VII.F is upheld.

Permit Attachment D.

22. Evonik objected to Attachment D during the public comment period and in its Petition stating Attachment D was incomplete.[87] Evonik did not address this condition in its briefing, but in its Motion for Summary Judgment IDEM agreed to incorporate any necessary information into the Permit once it is received by Evonik. The Attachment is remanded to IDEM.

[84] Petition, p. 6.
[85] Permit at pp. 41-42.
[86] Petition, p. 6.
[87] *Id*.

Related Permit Terms.

23. In its Petition, under Related Permit Terms, Evonik makes the following statements:

> Evonik objects to any other Permit terms that are affected by the objectionable provisions described above and requests that such affected provisions be harmonized with the suggested changes described above" and
>
> In setting forth its Permit objections in this Petition and in proposing recommended revisions, Evonik does not waive its right to amend, modify or enlarge upon its objections, the reasons for its objections or the recommended terms and conditions to modify the permit."[88]

Not only do these two paragraphs not comply with either IC 13-15-6 or 315 IAC 1-3-2(b)(4), Evonik could have availed itself of the ability to amend its Petition pursuant to 315 IAC 1-3-2(e) but did not. Evonik's objections are waived. *Troyers*, 2021 OEA 10.

Decision and Final Order

AND THE COURT finds Permit IND006050967 as issued to Evonik Corporation on October 31, 2023 is hereby **REMANDED** for the following revisions.

1. Revision of the Permit as follows:

   a. Correction of tank numbers in Condition V.A.[89]

   b. Replacement of "2012 Remediation Closure Guide" with "2022 Risk-Based Closure Guide" in the third paragraph of Condition VII.A.1.

   c. Revision of Condition VII.D.6. as set forth in IDEM Response, p. 15; and

   d. Completion of Attachment D, regarding which, Evonik shall submit the necessary information to IDEM with thirty (30) days of the issuance of this decision.

2. Proper publication of the revised Permit for public comment within ninety (90) days of the issuance of this decision.

[88] Petition, p. 6.
[89] Petition, p. 3.

3. After the requisite public comment period, provided no public comments implicate the revised conditions, IDEM must issue the Permit as revised.

The remainder of the Permit Conditions are **UPHELD** as written.

You are further notified that, pursuant to IC § 4-21.5-5, this Final Order is subject to judicial review. Pursuant to IC § 4-21.5-5, 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.

SO ORDERED on: January 3, 2025.