STATE OF INDIANA	)	IN THE MARION SUPERIOR COURT
	)SS:	
COUNTY OF MARION	)	ENVIRONMENTAL DIVISION, COURT F12

PEABODY MIDWEST MINING, LLC, Petitioner, v. INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, INDIANA OFFICE OF ENVIRONMENTAL ADJUDICATION, and SIERRA CLUB, Respondents.	)	Cause No. 49F12-1310-MI-17360
SIERRA CLUB, Petitioner, v. INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, INDIANA OFFICE OF ENVIRONMENTAL ADJUDICATION, and PEABODY MIDWEST MINING, LLC, Respondents.	)	

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SEP 23 2015 (232)

Myla A. Eldridge
CLERK OF THE MARION CIRCUIT COURT

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER ON PETITION FOR JUDICIAL REVIEW

On October 10, 2013, Peabody Midwest Mining, LLC, ("Peabody") filed its Verified Petition for Judicial Review of An Order Issued by the Office of Environmental Adjudication ("Peabody Petition"), seeking judicial review of portions of the Findings of Fact, Conclusions of Law, and Partial Final Order on Motions for Summary Judgment issued September 11, 2013, as amended by Nunc Pro Tunc Entry issued on September 19, 2013 ("OEA Order"). The Sierra Club also filed a Petition for Judicial Review ("Sierra Club's Petition") in Sullivan Circuit Court on October 16, 2013. The Sierra Club's Petition was transferred to this court on October 31, 2013.

On March 19, 2014, Peabody, the Sierra Club, and the Indiana Department of Environmental Management ("IDEM") each filed Initial Briefs on the Merits. On May 5, 2014, the Sierra Club filed its Opposition Brief, Peabody filed its Brief in Response to Sierra Club's Initial Brief, and the IDEM filed its Response Brief to the Initial Briefs of Sierra Club and Peabody Midwest Mining. On June 4, 2014, Peabody, the Sierra Club, and the IDEM filed Reply Briefs. Oral argument was held on June 30, 2014. Having read the parties' briefs, heard oral argument, and considered the Agency Record, the court now enters this Order denying the Sierra Club's Petition for Judicial Review and granting Peabody's Petition for Judicial Review.

FINDINGS OF FACT

The Bear Run Mine

1. The Bear Run Mine ("Mine") has operated since 1990 under Surface Mining Control and Reclamation Act ("SMCRA") Permit 256 and subsequent amendments to the permit. The Mine has been subject to comprehensive permitting requirements since it opened. Peabody acquired the Mine in 2005, and it encompasses 2,581 acres. To conduct surface mining, topsoils and subsoils are removed from cuts as wide as several hundred feet and as long as five miles. The coal is exposed, cleaned, loaded, and transported to a processing area. With each subsequent cut, soil is placed back into the pit which has been mined. As mining proceeds across a coal seam, sediment basins are added to catch runoff water, and basins are removed from reclaimed areas when mining halts. Reclamation occurs contemporaneously as mining progresses, and only portions of a property are mined at the same time. When mining ends, mined areas are returned approximately to their original contours. Most of the Mine is undisturbed land or reclaimed areas, and very little of it is actively mined.

2. Mining regulations require coal mines to control and manage storm water and other water that accumulates in the mining area. State and federal regulations require all surface

drainage to be controlled. Discharges of pollutants at the Mine do not result from industrial processes or chemicals used in mining. If pollutants are discharged, they are released because of storm water contact with soils and coal in active mining areas. Because the geology of the Illinois Coal basin is similar across the region, constituents in surface storm water discharges are generally the same among all the mines in the region.

3. The Mine uses sediment basins and other measures to prevent and control the release of pollutants in storm water. Sediment basins reduce sediment in water discharged from the basins by retaining the water for sufficient time to allow sediments to settle to the bottom of the basins.

4. Sediment basins are designed to specifications issued by regulatory agencies, including the IDEM and the Indiana Department of Natural Resources ("IDNR"). Sediment basins are designed to capture as much water as might fall in a rainstorm characterized as a 10-year, 24-hour event, including the amount of sediment that may be transported by that rainfall. Sediment basins are required to have a minimum amount of clearance between the pool level and the impoundment wall to prevent water from spilling over the top of the basin during rainstorms. Basins must control water for at least 10 hours to allow sediments to settle prior to discharging water through an outfall.

5. Few areas of the Mine do not route storm water runoff to sediment basins, including roads and the faces of dams. Water in these areas is controlled by approved management practices such as straw bales or filter fences.

6. Discharges usually occur intermittently after rain events, and water does not discharge continuously from sediment basins. All discharges are subject to state and federal water quality standards and require surface water monitoring to meet the requirements of the federal National Pollutant Discharge Elimination System ("NPDES").

7. Data relating to geologic structures and physical attributes of the mining area, the nature of the collected storm water discharged from the Mine, and the water quality of the receiving waters into which discharges are made is compiled and evaluated by the Mine and by regulatory agencies.

Regulation of the Mine

8. The IDNR administers Indiana's state statutes and rules to implement the requirements of the SMCRA for surface coal mines. The SMCRA permit process requires a detailed permit application, including administrative information, proposed operating plan, proposed reclamation plan, and bonding provisions to ensure resources are available to conduct reclamation. Information concerning soils, agronomy, fish and wildlife biology, blasting, geology, hydrology, archaeology, and engineering for sediment control structures are required. Applicants must sample waters that will receive discharges from the mine, including six months of pre-mining characterization tests to establish baseline water quality data. Applicants must provide an analysis of Probable Hydrologic Consequences to ensure the quantity and quality of groundwater and surface water are not harmed by mining. If the IDNR concludes the application is designed to prevent material damage to the hydrologic balance beyond the permitted areas, it may issue a permit.

9. After a SMCRA permit issues, intensive water monitoring is required. The IDNR requires upstream and downstream monitoring for parameters including water flow, pH, total dissolved solids (TDS), total suspended solids (TSS), total iron, and total manganese. Peabody analyzed water at the Mine for sulfates and trace metals, voluntarily and pursuant to a formal request from the U.S. Environmental Protection Agency ("EPA"). No water quality violations or effluent excursions were detected at the Mine's outfalls during sampling. Quarterly water monitoring is required to assess overall drainage from the Mine. The Mine must submit

Discharge Monitoring Reports to the IDNR to show compliance, and additional monitoring may be required by the IDNR. If a surface water sample indicates noncompliance with any permit terms or conditions, the permit holder must notify the IDNR promptly and take immediate corrective action required by the reclamation plan or permit. Monitoring under the SMCRA program is required for the same constituents regulated by an NPDES permit, including TDS, sulfates, chlorides, and pH.

10. The SMCRA does not allow its permits to substitute for NPDES permits required under the federal Clean Water Act for discharges of water from surface coal mines, and mine operators must apply for a separate NPDES permit to discharge water. When the IDEM receives an application for an NPDES permit for a coal mine, it coordinates with the IDNR's permit program to ensure the agencies are consistent in their oversight and comprehensive in addressing a mine's potential impacts.

11. The IDNR collects extensive water quality data on discharges from sediment basins at Indiana coal mines. The IDNR monitors approximately 300 active outfalls and has issued permits for more than 350 surface mines. These applications have generated a tremendous amount of geologic information concerning the coal seams mined in Indiana, and each application for a mine permit has an associated water monitoring plan.

12. The IDNR has received information concerning water discharges from the Mine for more than 20 years. However, the only significant variation in nature or quality of water discharged or the impact on receiving waters resulted from mining operations that existed before the Mine opened. No water quality issues have arisen from regulated discharges out of the sediment basins at the Mine or into the receiving waters. The record in this case does not reflect any violations or enforcement action by regulators against the Mine.

13. The water quality of receiving streams at the Mine was characterized using pre-

mining baseline water quality data, as required by the IDNR under Indiana's SMCRA program.

14. The IDEM and the IDNR share enforcement authority for the Mine's compliance with applicable water quality standards under a Memorandum of Responsibility. The IDNR and the IDEM coordinate and exchange technical information about potential concerns and enforcement actions. Monitoring reports for Indiana surface coal mines are submitted to the IDEM and regularly reviewed by its Office of Water Quality, whose enforcement staff have access to information regarding any exceedances of water quality effluent limitations at Indiana coal mines. Potential exceedances of acceptable standards are reviewed by the Office of Water Quality compliance staff and referred to the IDEM's enforcement staff, if appropriate. Enforcement staff evaluate whether exceedance data are correct, consider the duration, frequency, and impact of violations, and determine whether violations were deliberate.

15. The IDNR submits copies of its quarterly inspections to the IDEM. Interagency conversations between permitting and enforcement personnel occur at least weekly.

The NPDES Permitting Program

16. Under the NPDES program, all facilities discharging pollutants from any point source into waters of the United States are required to obtain a permit. (See 33 U.S.C. § 1342; 327 IAC 5-2-7) Federal and Indiana regulations authorize two different types of permits under the NPDES: individual NPDES permits and general NPDES permits. Discharges authorized through individual NPDES permits have facility-specific discharge limitations and monitoring requirements. In contrast, general permits establish discharge limitations for sources within a particular industrial category for facilities with similar processes and wastewater characteristics. A general permit authorizing water discharges may be issued for certain classes of activities and discharges instead of an individual NPDES permit that otherwise could be required.

17. The Indiana Water Pollution Control Board ("WPCB") established Indiana's

general permit rules as a streamlined administrative program to provide NPDES discharge authorization for certain categories of discharging facilities whose wastewaters have similar characteristics and pollutants. There are two major components to Indiana's rules for general permits. 327 IAC 15-1 to -4 provide basic administrative and programmatic framework for the general permit program. 327 IAC 15-5 to -16 provide eleven categories for general permits. Each of these eleven categories establishes a specific type of wastewater source which may qualify for a general permit. 327 IAC 15-7 provides general permits for "Facilities Engaged in Mining of Coal, Coal Processing, and Reclamation Activities."

18. Ind. Code § 13-18-18-1 requires the IDEM "shall establish a general coal mine permit that may be obtained for a facility instead of obtaining another more specialized National Pollutant Discharge Elimination System coal mine permit." Our statute also provides the IDEM "shall determine the criteria that must be met to qualify for the general permit." Ind. Code § 13-18-18-2.

19. The IDEM is authorized to make rules and to implement and enforce Indiana's environmental laws under Ind. Code § 13-13, *et seq.*.

20. 327 IAC 15-7 ("Rule 7") regulates wastewater discharges from surface mining, underground mining, and reclamation projects and requires best management practices for storm water to protect public health, existing water uses, and aquatic biota. To be eligible to receive a general permit under Rule 7, a discharge must fall within the scope of the rule and not be excluded from general permit coverage under 327 IAC 15-2-6 or 327 IAC 15-2-9(b).

21. To apply for authorization to discharge under any general permit rule, including Rule 7, a discharger files a Notice of Intent ("NOI") with the IDEM. According to 327 IAC 15-3-2, the basic information required in an NOI includes the name and location of the discharging facility, a standard industrial classification code for the principal products or activities of the facility, its contact

information and location, the names of the waters into which discharges will be made, and a description of how the facility complies with Rule 7's discharge requirements. Because Peabody's permit issued under Rule 7, Peabody's NOI was required to include additional information specified by 327 IAC 15-7-5(a). According to 327 IAC 15-7-5(b), upon receiving an NOI, the IDEM must "[r]eview the NOI for applicability pursuant to section 3 of this rule and for compliance with the requirements of subsection (a)."

22. Prior to adopting Rule 7 in 1994, the IDEM used federal effluent limits contained in 40 CFR Part 434 to establish the terms and conditions of individual NPDES permits for surface coal mines with sediment basin discharges. Rule 7 was written to specify the way the IDEM wrote individual permits based on the EPA's effluent guidelines in Part 434 and to reduce an applicant's administrative burden.

23. There are differences between Rule 7 and the EPA's Part 434 effluent limitation guidelines, and several provisions of Rule 7 are more stringent than the standards in Part 434. For instance, the daily maximum and daily average limits for total iron under Rule 7 are 6.0 mg/1 and 3.0 mg/1, respectively, while Part 434 requires less protective limits of 7.0 mg/1 and 3.5 mg/1 for certain facilities. Rule 7 also requires reporting some parameters and pollutants not required under Part 434, including water flow, influent pH, influent total iron, total aluminum, total copper, total zinc, and total nickel.

24. The effluent limitations in Rule 7 are "daily minimum," "daily maximum," and "daily average" limits. The "daily minimum" limit in Rule 7 requires the concentration for the measured parameter to be above the established limit for days on which a sample is obtained. The "daily maximum" requires the concentration to be below the established limit for days on which a sample is obtained. The "daily average" requires the average of samples used to establish compliance with the daily limits to be below the established limit for days on which a sample is obtained.

25. Rule 7 also contains alternative effluent limits that apply during "10-year, 24-hour storm" events. Peabody routinely collects and submits information on the duration and volume of rainfall at the Mine to the IDEM.

26. Rule 7 sets effluent limitations based on water quality under 327 IAC 15-7-7(b) for coal mines seeking discharge authorization. 327 IAC 15-7-7(b)(2) to (5) establish discharge restrictions, generally referred to as narrative water quality-based effluent limitations ("narrative WQBELs"):

> (2) The discharge shall not cause excessive foam in the receiving waters.
> (3) The discharge shall be essentially free of floating and settleable solids.
> (4) The discharge shall not contain oil or other substances in amounts sufficient to create a visible film or sheen on the receiving waters.
> (5) The discharge shall be free of substances that are in amounts sufficient to be unsightly or deleterious or which produce color, odor, or other conditions in such a degree as to create a nuisance.

Narrative WQBELs apply uniformly to all coal mine discharges authorized under Rule 7.

27. Rule 7 also requires mines to use "best management practices," or exemplary activities a facility can take to minimize the amount of pollutants discharged to surface waters. A mine may install vegetation to stabilize a slope and to reduce the amount of sediments that run off during rain storms or build a series of sedimentation ponds to collect sediments before they reach a stream. The IDEM does not specify individual best management practices for each facility but requires specific parameters for all discharges for coal mines under general permits.

28. 327 IAC 15-7-8 requires coal mines to comply with the standard conditions for NPDES general permits. Rule 7 also imposes management and reporting requirements and prohibits bypassing control measures if it appears likely the bypass will cause exceedances of effluent limitations.

29. Under 40 C.F.R. § 123.44, the EPA has time to issue comments, object to, or make recommendations concerning general permits proposed for issue by state permitting

agencies. 40 C.F.R. § 123.44(a). The EPA submitted comments on the IDEM's general permit program on September 10, 1990, and approved the IDEM to implement a general permitting program on April 2, 1991.

30. In approving Indiana's general permit program in 1991, the EPA concluded that "[b]ased on its review of Indiana's legal authority, U.S. EPA determined that no statutory or regulatory changes were necessary for the State to administer a general permits program." The EPA also decided that "based upon Indiana's program description and upon its experience in administering an approved NPDES program, EPA has concluded that the State will have the necessary procedures and resources to administer the general permits program." 56 Fed. Reg. 21,158 (May 7, 1991).

31. The general provisions in Rule 1 of the General Permit Program and the basic general permit requirements in Rule 2 were promulgated on August 31, 1992. 16 Ind. Reg. 16 (Aug. 31, 1992). Rule 7 was promulgated on May 25, 1994. 17 Ind. Reg. 2284 (May 25, 1994). Rule 7 was readopted on January 10, 2001. 24 Ind. Reg. 1518 (Jan. 10, 2001). Rule 7 was readopted again on November 21, 2007. 20071219-IR-327070553BFA (Nov. 21, 2007). The OEA Record indicates no representative of the EPA appeared at any public hearing held during the rulemaking process for Rule 7 in 1993 or 1994 and indicates the EPA did not provide written comments on the rules during rulemaking in 1994 or the re-adoption processes in 2001 and 2007.

Peabody's NPDES Permit Modifications

32. Peabody submitted NOIs to the IDEM to modify its NPDES General Permit No. ING040239 on March 25, 2010, April 12, 2010, and April 27, 2010 ("Modifications"). The NOIs requested authorization for discharges from outfalls planned or already constructed at the Mine.

33. Rule 7 requires an NOI to contain all information required by 327 IAC 15-3 and 327 IAC 15-7-5, neither of which requires an applicant to state whether its proposed discharges

will degrade the receiving waters or to determine that degradation is necessary for economic or social factors.

34. There is no dispute each of Peabody's NOIs complied with the requirements of 327 IAC 15-7-5. The Sierra Club admitted Peabody complied with the requirements for submitting a Notice of Intent letter under Rule 7.

35. On June 15, 2010, the IDEM approved the NOIs to modify the Permit and authorized changes to discharges ("Modifications") under the Mine's general NPDES permit. The Modifications included the following changes to operation under the general permit:

- Active outfalls were added:
  - Outfall 016R discharging to Buttermilk Creek.
  - Outfall 018R discharging to an unnamed tributary to Black Creek.
- Proposed outfalls already incorporated in the Permit were ready to be constructed and activated:
  - Outfall 041N discharging to an unnamed tributary to Spencer Creek.
  - Outfall 042 discharging to an unnamed tributary to Pollard Ditch.
- The mine drainage status of unconstructed Outfalls 045, 046, 049, and 050, which were already included in the Permit, was changed from "Undetermined" to "Alkaline."
- Unconstructed Outfall 041S, which was included in the Permit, was deleted because it was no longer needed.
- New, unconstructed alkaline mine drainage status Outfalls 009, 011, and 053 through 063 were added to the Permit but not activated by the Modifications.

36. The new or modified discharges under the Modifications to the Mine's general NPDES permit ("Discharges") consist of accumulated storm water runoff collected in sedimentation

basins that occasionally discharge water due to precipitation. New water discharges are episodic after rain storms and do not result from continuous industrial operations.

37. The receiving waters for the new Discharges are Buttermilk Creek, an unnamed tributary to Black Creek, an unnamed tributary to Middle Fork Creek, an unnamed tributary to Spencer Creek, an unnamed tributary to Pollard Ditch, an unnamed tributary to Buttermilk Creek, Spencer Creek, and an unnamed tributary to Maria Creek.

38. None of the receiving waters for Peabody's Discharges is designated by the Water Pollution Control Board as an Outstanding State Resource Water, an Outstanding National Resource Water, or an Exceptional Use Water, nor is any receiving water a tributary of such special waters. There are no Outstanding State Resource Waters near the Mine, and no Outstanding National Resource Waters have been designated in Indiana. Designated Exceptional Use Waters outside the Great Lakes Basin are listed in 327 IAC 2-1-11.

39. Indiana's 2008 list of impaired waters under §303(d) of the Clean Water Act ("§303 list") identifies Buttermilk Creek and Busseron Creek as impaired for TDS and sulfate; Black Creek, Spencer Creek, and Brewer Ditch as impaired for total dissolved solids, sulfates and "impaired biotic communities"; and Maria Creek as impaired for "impaired biotic communities" and dissolved oxygen. With the exception of two outfalls discharging into Buttermilk Creek, the Mine does not discharge directly into any stream segment listed as "impaired" on the §303(d) list.

Proceedings before the Office of Environmental Adjudication

40. On June 30, 2010, the Sierra Club and others[1] filed their Petition for Administrative Review of the Modification of Bear Run Mine NPDES General Permit No. ING040239. The petition was amended on August 12, 2010.

41. On July 22, 2011, the Sierra Club filed its Motion for Summary Judgment.

[1] The other Petitioners, Hoosier Environmental Council and its individual members, voluntarily withdrew their Petition, and the ELJ dismissed it on June 28, 2011.

42. On August 22, 2011, the parties jointly moved to apply certain findings of fact and conclusions of law entered by the presiding Environmental Law Judge ("ELJ") in another case (Cause No. 10-W-J-4350, referred to as the "Farmersburg Case"). In the Farmersburg Case, the OEA dismissed the petitioner's attempts to invalidate Rule 7 for failure to state a claim upon which the OEA could grant relief.

43. The ELJ granted the joint motion and entered her Findings of Fact, Conclusions of Law and Order reflecting the joint motion on August 24, 2011, and dismissing Counts 7 and 8 of the Sierra Club's Amended Petition because the counts failed to state a claim on which relief could be granted, as those counts asserted facial challenges to Rule 7 over which the OEA had no jurisdiction.

44. The Sierra Club's Petition does not challenge the ELJ's order of August 24, 2011, or the ELJ's order dismissing Counts 7 and 8.

45. The issues raised by the Sierra Club in its Amended Petition for Administrative Review in the OEA were:

> Count 1: IDEM failed to ensure that the Discharges would comply with water quality standards (i) because it did not conduct RPE analysis to determine whether WQBELs were necessary to control the Discharges and (ii) because it authorized Discharges without an approved Total Maximum Daily Load ("TMDL").
>
> Count 2: IDEM failed to assess the existing beneficial uses for the receiving waters for the Discharges by identifying the existing uses of downstream waters and the pollutants in the proposed waste stream, and by evaluating the impact of the Discharges on those existing uses.
>
> Count 3: IDEM failed to conduct a required Tier II antidegradation analysis of the Discharges to ensure they will protect existing uses and not lower the quality of the receiving waters.
>
> Count 4: IDEM's failure to issue an individual permit to Peabody was arbitrary, capricious and an abuse of discretion because the applicable requirements are not adequate to ensure compliance with water quality standards, and the Mine is not in compliance with the terms and conditions of the general permit rule.
>
> Count 5: The Permit is not an enforceable NPDES permit because it does not contain specific effluent limits nor identifies best management practices.

Count 6: The Permit does not require adequate monitoring of Discharges and receiving waters.

46. On September 19, 2013, the ELJ granted summary judgment in favor of Peabody and the IDEM on all counts except Count 3 of the Sierra Club's Amended Petition for Administrative Review. On Count 3, the ELJ granted summary judgment for the Sierra Club, ordering a remand of the approved Modifications to the IDEM with instructions to perform a site-specific, Tier II antidegradation review of the Discharges.

47. The ELJ concluded the Sierra Club has no knowledge and presented no evidence of the specific constituents of the Discharges, including what metals are contained in the Discharges, the concentration of TSS or pH levels of the Discharges; the specific locations in the receiving waters and how impairments relate to the outfalls; the water quality of the receiving waters for the Discharges; whether the Discharges will violate water quality standards; or whether impairments in the receiving waters are caused by discharges from coal mines.

48. The Sierra Club admits it has the burden to demonstrate the IDEM's actions were invalid as to Counts 1, 2, 4, and 6 of its Amended Petition. However, the Sierra Club contends it met its burden of proof by asserting the IDEM was obliged as a matter of law to assure the Discharges would comply with water quality standards and other Clean Water Act requirements using site-specific analysis instead of merely reviewing information in the NOIs and by showing the IDEM failed to perform site-specific analysis.

49. The OEA had jurisdiction over and is the ultimate authority regarding the decisions of the Commissioner of the IDEM pursuant to Ind. Code §4-21.5-7, *et seq.*, and per Ind. Code §4-21.5-3-7(a)(1)(A).

CONCLUSIONS OF LAW

1. This court shall grant relief under the Indiana Administrative Orders and

Procedures Act ("AOPA") if it finds the OEA Order is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or unsupported by substantial evidence. Ind. Code §4-21.5-5-14 (d)(1), (3), (5).

2. The party seeking review carries "the burden of demonstrating the invalidity of agency action." Ind. Code § 4-21.5-5-14(a). The burden of demonstrating the invalidity of the OEA Order is on the party seeking judicial review of part or all of the order. *Natural Resources Comm'n. v. Amax Coal Co.*, 638 N.E.2d 418 (Ind. 1994).

3. This court's judicial review must be confined to the agency record. Ind. Code § 4-21.5-5-11.

4. A court may only overturn a finding of fact if it is "unsupported by substantial evidence." Ind. Code §4-21.5-5-14(d). When reviewing an agency decision, "the court is bound by the findings of fact made by the agency if those findings are supported by substantial evidence." *Hamilton County Department of Public Welfare v. Smith*, 567 N.E.2d 165, 167-8 (Ind. Ct. App. 1991). "Findings of fact are clearly erroneous when the record lacks any facts or reasonable inferences to support them. In determining whether the findings of fact are clearly erroneous, we consider the evidence most favorable to the judgment along with the reasonable inferences to be drawn therefrom." *Save the Valley, Inc. v. Indiana Department of Environmental Management*, 724 N.E.2d. 665, 668 (Ind. Ct. App. 2000).

5. According to the Indiana Supreme Court, "an agency decision may be reversed by an appellate court only where it is purely arbitrary, or an error of law has been made." *Indiana Civil Rights Commission v. Delaware Circuit Court*, 668 N.E.2d 1219, 1221 (Ind. 1996). "An action of an administrative agency is arbitrary and capricious only where there is no reasonable basis for the action." *Id.* An agency acts arbitrarily or capriciously if its action constitutes a

willful or unreasonable action, without consideration and in disregard of the facts and circumstances of the case or without some basis which would lead a reasonable and honest person to such action. *Indiana Bd. Of Pharmacy v. Crick*, 433 N.E.2d 32, 39 (Ind. Ct. App. 1982).

6. A reviewing court may neither try the case *de novo* nor substitute its judgment for that of the agency. Ind. Code §4-21.5-5-11; *Indiana Dept. of Environmental Management v. Schnippel Construction, Inc.*, 778 N.E.2d 407 (Ind. Ct. App. 2002).

7. A court reviewing an administrative decision may set aside the agency's action if it is not in accordance with law. Ind. Code §4-21.5-5-14. "Law is the province of the judiciary, and courts rather than administrative agencies are charged with the responsibility to resolve questions of statutory construction." *Ind. Dept. of Natural Resources v. Town of Syracuse, et al.*, 686 N.E.2d 410 (Ind. Ct. App. 1997), quoting *Monce v. Bd. of Directors of the Public Employees Retirement Fund*, 652 N.E.2d 532, 534 (Ind. Ct. App. 1995), *reh. denied, trans. denied.* On review, a court may set aside any administrative agency's determination that is not in accordance with law. *Natural Resources Comm'n v. Amax Coal Co.*, 638 N.E.2d 418, 423 (Ind. 1994).

8. According to the Indiana Supreme Court, when construing a statute, the goal of a court is to determine, give effect to, and implement the intent of the legislature. *N.D.F. v. State of Indiana*, 775 N.E.2d 1085 (Ind. 2002). A court will not read into a statute that which is not the expressed intent of the legislature. *Id.* Therefore, it is just as important to recognize what the statute does not say as it is to recognize what it does say. *Id.*

9. The Indiana Legislature directed the IDEM to establish a general permit program for eleven categories of dischargers, including storm water discharges associated with industrial activity, sand and gravel operations, and construction activity, and it specifically mandated the IDEM to establish a general permit process for coal mines to use "...instead of obtaining another

more specialized National Pollutant Discharge Elimination System coal mine permit." Ind. Code §13-18-18-1.

10. Trial and appellate courts have upheld general permit programs at the state and federal levels, including the Ninth Circuit Court of Appeals, which concluded,

> A general permit is a tool by which EPA regulates a large number of similar dischargers. Under the traditional general permitting model, each general permit identifies the output limitations and technology-based requirements necessary to adequately protect water quality from a class of dischargers. Those dischargers may then acquire permission to discharge under the Clean Water Act by filing NOIs, which embody each discharger's agreement to abide by the terms of the general permit. Because the NOI represents no more than a formal acceptance of terms elaborated elsewhere, EPA's approach does not require that permitting authorities review an NOI before the party who submitted the NOI is allowed to discharge. General permitting has long been recognized as a lawful means of authorizing discharges.

Environmental Defense Cent. v. EPA, 344 F.3d 832 at 853 (9th Cir. 2003).

11. When construing administrative rules, courts use the same principles of construction as applied to statutes. *Indianapolis Historic Partners v. State Bd. of Tax Comm'rs,* 694 N.E.2d 1224, 1227 (Ind. Tax Ct. 1998). The court looks at the plain language of the rule and, if unambiguous, gives effect to that plain meaning. *Id.*

12. 327 IAC 5-1.5-20 defines a "general permit" as

> an authorization to discharge under the NPDES rules, that is applicable to all owners and operators of point sources of a particular category located within a designated general permit boundary (GPB), other than owners and operators of such sources to whom individual NPDES permits have been issued.

13. 327 IAC 15-1-1 *et seq.* establishes NPDES general permit rules for specific classes or categories of point source discharges which, if followed, obviate the need for individual permits. The rule's purpose to implement the Legislature's mandate for general permits is stated plainly:

> The purpose of this article is to establish NPDES general permit rules for certain classes or categories of point source discharges by prescribing the policies, procedures, and technical criteria to operate and discharge under the requirements of a NPDES general permit rule. Compliance with all requirements of applicable general permit rules may obviate the need for an individual NPDES permit issued

under 327 IAC 5. A facility can operate under an individual NPDES permit and one (1) or more applicable general permit rules.

14. 327 IAC 15-2-7(a) states: "Compliance with a general permit rule constitutes compliance with all applicable standards and limitations of the Federal [Clean Water] Act and state law." In the absence of evidence of violations or even any evidence concerning the specific constituents of the Discharges, it is impossible for the Sierra Club to demonstrate the IDEM abused its discretion in approving the Modifications or to show the Discharges will violate water quality standards. As the ELJ concluded, "When 327 IAC 15-2-7 and 327 IAC 15-1-1 are read together, it creates a presumption that the requirements of Rule 7 are adequate to meet requirements of the CWA (Clean Water Act)." OEA Order, Conclusion of Law No. 10, p. 10.

15. On judicial review, the Sierra Club did not challenge the ELJ's Findings of Fact as incorrect. The Sierra Club also admitted there is no evidence in the administrative record concerning the constituents in the Discharges. The Sierra Club asserted it had no duty to present such evidence because "the specific composition of the Bear Run Mine discharges and waters receiving those discharges is irrelevant." The Sierra Club's assertion, if accepted, would defeat the Legislature's intent in creating a general permit program.

16. The ELJ correctly concluded there was no evidence in the record the Discharges would violate water quality standards. In the absence of any evidence of violations, it is impossible for the Sierra Club to challenge the ELJ's Findings of Fact.

17. On Count 1, the ELJ correctly concluded the Sierra Club did not meet its burden on summary judgment because it presented no evidence concerning the constituents of the Discharges or the character of the receiving waters. OEA Order Conclusion of Law No. 21, p. 13. The ELJ's entry of summary judgment in favor of the IDEM and Peabody on Count 1 is AFFIRMED.

18. On Count 2, the ELJ correctly concluded the Sierra Club did not meet its burden on summary judgment because it presented no evidence the Discharges would interfere with existing uses in the receiving waters and because it presented no evidence Peabody's NOI was deficient. OEA Order, Conclusions of Law Nos. 29 and 30, pp. 14-15. The ELJ's entry of summary judgment in favor of the IDEM and Peabody on Count 2 is AFFIRMED.

19. On Count 4, the ELJ correctly concluded the Sierra Club did not meet its burden on summary judgment because it presented no evidence contradicting the presumption under Rule 7 that "Compliance with a general permit rule constitutes compliance with all applicable standards and limitations of the Federal Act and state law" or that the IDEM's exercise of its sound discretion in regulating the Mine under a general permit was arbitrary or endangered public health. OEA Order, Conclusions of Law Nos. 46, 47, and 48. The ELJ's entry of summary judgment in favor of the IDEM and Peabody on Count 4 is AFFIRMED.

20. On Count 6, the ELJ correctly concluded the Sierra Club did not meet its burden on summary judgment because it presented no evidence contradicting the presumption under Rule 7 that "Compliance with a general permit rule constitutes compliance with all applicable standards and limitations of the Federal Act and state law" or that Rule 7's monitoring and enforcement requirements are insufficient and unenforceable. The ELJ also concluded the Sierra Club failed to present evidence Peabody's NOI for the Modifications was deficient. OEA Order, Conclusions of Law Nos. 59 and 60, p. 19. The ELJ's entry of summary judgment in favor of the IDEM and Peabody on Count 6 is AFFIRMED.

21. 327 IAC 15-2-9(b) states in relevant part:

> (b) The commissioner may require any person either with an existing discharge subject to the requirements of this article or who is proposing a discharge that would otherwise be subject to the requirements of this article to apply for and obtain an individual NPDES permit if one (1) of the six (6) cases listed in this subsection occurs. Interested persons may petition the commissioner to take action under this

subsection. Cases where individual NPDES permits may be required include the following:

(1) The applicable requirements contained in this article are not adequate to ensure compliance with:

(A) water quality standards under 327 IAC 2-1 or 327 IAC 2-1.5; or

(B) the provisions that implement water quality standards contained in 327 IAC 5.

(2) The person is not in compliance with the terms and conditions of the general permit rule...

22. 327 IAC 15-2-10, provides "[n]o general permit rule shall be promulgated and issued where the terms and conditions of the permit rule do not comply with the applicable guidelines and requirements of the Federal [Clean Water] Act or effective regulations promulgated under the Federal [Clean Water] Act, 327 IAC 2, 327 IAC 5, or this article."

23. Rule 7 reiterates the State's policy for regulating surface mining:

> The purpose of this rule is to regulate wastewater discharges from surface mining, underground mining, and reclamation projects which utilize sedimentation basin treatment for pit dewatering and surface run-off and to require best management practices for storm water run-off so that the public health, existing water uses, and aquatic biota are protected.

327 IAC 15-7-1 *et seq.*

24. The ELJ correctly held the Sierra Club may not attack the validity of Rule 7, and the Sierra Club has not challenged the ELJ's ruling in this appeal. Rule 7 of the general permit rules is a properly promulgated rule, and the Sierra Club may not attack its validity in this proceeding.

25. Individual NPDES permits, as provided in 327 IAC 5-2 and 5-3, are developed on an individualized basis from permit applications that provide detailed, site-specific information about the discharging source, the processes generating the discharge, the quality and pollutant content of the discharge, and the characteristics of the waters receiving the discharge.

26. In contrast to an individual NPDES permit, a general NPDES permit is written in a much different manner. Each general permit is developed for a class or group of dischargers with a specific type of discharge having similar qualities and pollutant characteristics. The permitting

agency gathers and reviews technical information on the class or category of dischargers, characteristics of similar discharges from members of the class or category, pertinent regulatory requirements, and potential water quality impacts. The permitting agency then develops a general permit to provide a uniform set of effluent limitations and related requirements governing discharges from all members of the class or category of dischargers.

27. The court in *Environmental Defense Ctr. v. EPA*, 344 F.3d 832, 853 (9th Cir. 2003), provided a summary of general permit programs in implementing the Clean Water Act:

> A general permit is a tool by which EPA regulates a large number of similar dischargers. Under the traditional general permitting model, each general permit identifies the output limitations and technology-based requirements necessary to adequately protect water quality from a class of dischargers. These dischargers may then acquire permission to discharge under the Clean Water Act by filing NOIs, which embody each discharger's agreement to abide by the terms of the general permit. Because the NOI represents no more than a formal acceptance of terms elaborated elsewhere, EPA's approach does not require that permitting authorities review an NOI before the party who submitted the NOI is allowed to discharge. General permitting has long been recognized as a lawful means of authorizing discharges. *Natural Res. Def. Council v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977).

Under the EPA's traditional approach to the General Permit Program, NOIs do not provide substantive information about a particular facility's discharge for which authorization is sought under a general permit, and a substantive review of a NOI is not required prior to receiving discharge authorization under a general permit.

28. Indiana's general permit program does not require the IDEM to conduct a site-specific review of each discharge requested for approval by NOI under a general permit. The permitting agency, in drafting the terms of the general permit, considers all requirements of the Clean Water Act's NPDES program, including the ability of the class or category of discharges to comply with water quality standards. Once the permit terms are developed for the class or category of dischargers, the general permit is issued. Each general permit uniformly applies the

preset effluent limits, monitoring requirements, and other permit conditions for dischargers requesting coverage under the general permit and subsequent NOIs.

29. The regulatory agency overseeing a general permit is charged with obtaining the necessary information about the facility and determining the conditions of each permit. As the court found in *Sierra Club v. ICG Hazard, LLC,* 2012 U.S. Dist. LEXIS 146140, *19 - *22 (E.D. Ky., Sept. 8, 2012):

> . . . the EPA explained [in certain general permit guidance] that although the "same types of wastes" must be found to be eligible for a general permit, general permittees can be subject to different effluent limitations and monitoring if circumstances require. . . . If differences exist between dischargers that are eligible for a general permit, the issuing agency is instructed to reconcile those differences and the requirements imposed by the CWA (Clean Water Act) through information requirements in the notice of intent.

30. The court concludes the authorities offered by the Sierra Club in support of its assertion the IDEM was required to engage in a site-specific review of Peabody's request for authorization of the Discharges under Rule 7 do not support the Sierra Club's position. The general permit program authorized by the EPA and administered by the IDEM does not contemplate or require substantive review of site-specific information as a precondition to authorizing discharges under a general permit. Even where limited, site-specific information may be required by an NOI for a general permit, the general permit rules do not contemplate additional site-specific reviews beyond the information required by an NOI.

31. On Count 5, the ELJ correctly concluded the Sierra Club did not meet its burden on summary judgment because the Sierra Club asserted the general permit and its Modifications did not constitute an enforceable NPDES permit unless it contained specific effluent limits and particular best management practices. The Sierra Club cannot challenge Rule 7 in this proceeding, and the ELJ correctly rejected the Sierra Club's assertion that Rule 7 itself is insufficient to comply

with the requirements of the Clean Water Act. OEA Order, Conclusions of Law Nos. 53 and 54, pp. 18-19. The ELJ's entry of summary judgment on behalf of the IDEM and Peabody is AFFIRMED.

32. In Count 3, the Sierra Club contends 327 IAC 15-2-9(b)(1) required the IDEM to conduct site-specific, antidegradation review of the Discharges under Peabody's general permit. 327 IAC 15-2-9(b) provides the IDEM "may require" a person seeking authorization to discharge under a general permit to obtain an individual NPDES permit if one of six circumstances listed in subsection (b) occurs. Reading the plain language of the rule, the ELJ correctly concluded the term "may require" gave the IDEM discretion to require an individual permit if one of the six circumstances applied. OEA Order, Conclusion of Law No. 9, p. 10. The court concurs with the ELJ's conclusion that 327 IAC 15-2-9(b) vests the IDEM with discretionary authority to require an individual permit instead of a general permit if one or more of the six circumstances exist.

33. The Sierra Club admits the IDEM has discretion to require an individual permit if one or more factors identified in 327 IAC 15-2-9(b) exist. However, the Sierra Club asks this court to order the IDEM to forego its discretion by requiring the Mine to obtain an individual permit merely because the Sierra Club fears the Discharges may not meet water quality standards. To grant the Sierra Club's request, this court would have to deprive the IDEM of its discretion under 327 IAC 15-2-9(b)(1) and require Peabody to obtain an individual NPDES permit for the Discharges, even though other similarly situated mines holding general permits are not required to comply. The court also would have to find the IDEM's decision not to require an individual permit was arbitrary and capricious, abused its discretion, or was contrary to law. The court cannot reach these conclusions.

34. The ELJ properly found the Sierra Club presented no evidence concerning the specific constituents of the Discharges, including what metals are contained in the Discharges, the

concentration of TSS in the Discharges, or the pH of the Discharges; the specific location in the receiving waters at which listed impairments exist in relation to the outfalls; the water quality of the receiving waters for the Discharges; whether the Discharges will cause any exceedances of applicable water quality standards; or whether the impairments to receiving waters are the result of discharges from coal mines. OEA Order, Conclusion of Law No. 46, p. 18.

35. The ELJ correctly concluded that 327 IAC 15-1-1 and 327 IAC 15-2-7(a) create a presumption the requirements of Rule 7 and the general permit rules are adequate to meet the requirements of the Clean Water Act. The ELJ also properly concluded the Sierra Club can only succeed by demonstrating the IDEM abused its discretion in not requiring an individual permit by presenting sufficient evidence to show the Modifications will not ensure compliance with water quality standards. For the Sierra Club to prevail, it would have to prove the requirements of the general permit were inadequate to maintain water quality by producing evidence of the specific constituents of the Discharges authorized under the Modification and the characteristics of the receiving waters. OEA Order, Conclusions of Law Nos. 7, 10, and 11, pp. 10-11.

36. Indiana's antidegradation standards when the Modifications were approved appeared in 327 IAC 2-1-2, which was repealed in 2012. The antidegradation requirements applied to waters of higher quality than applicable water quality standards, as established in 327 IAC 2-1-2(2):

> The following policies of nondegradation are applicable to all surface waters of the state:
> (1) . . .
> (2) All waters whose existing quality exceeds the standards established herein as of February 17, 1977, shall be maintained in their present high quality unless and until it is affirmatively demonstrated to the commissioner that limited degradation of such waters is justifiable on the basis of necessary economic or social factors and will not interfere with or become injurious to any beneficial uses made of, or presently possible, in such waters. In making a final determination under this subdivision, the commissioner shall give appropriate consideration to public participation and intergovernmental coordination.

37. In Count 3, the ELJ ruled 327 IAC 2-1-2 places the burden on the permit holder to demonstrate "limited degradation of such waters is justifiable on the basis of necessary economic or social factors and will not interfere with or become injurious to any beneficial uses made of, or presently possible, in such waters" and held the Sierra Club was not required to present specific evidence the Discharges would contribute to lower water quality. OEA Order, Conclusion No. 41, p. 17. However, the ELJ's ruling in Count 3 contradicts her legal conclusion that compliance with Rule 7 and the general permit rules are presumed to satisfy the requirements of the Clean Water Act.

38. The ELJ's ruling presumes the Modifications will result in new discharges, although the record is devoid of any evidence to conclude they would result in violations of any water quality standards or differ in content or character from other discharges approved under the Mine's general permit. The ELJ held, "The Modification allows for new discharges. Therefore, it is relatively clear from the rule in effect at the time that this Modification was made that a Tier II antidegradation review was necessary." OEA Order, Conclusion of Law 37, p. 16. Even if the Modifications resulted in new discharges, there is no factual basis to support a legal conclusion the Discharges will violate Rule 7 or the general permit rules or diminish water quality. In the absence of this evidence, there is no factual support or legal reason to question the IDEM's approval of the Modifications under the general permit rules or to require a site-specific, antidegradation review for each outfall to protect the receiving streams.

39. Our Legislature clearly stated its intention for the IDEM to implement a general permit program, and it delegated to the Water Pollution Control Board the authority to make rules to implement its intentions. The Legislature also vested in the IDEM the sound discretion to implement Indiana's statutes and rules to give effect to the Clean Water Act. It is not the province of this court or the OEA to add to or alter these requirements.

40. The ELJ cited the conclusion of the U.S. District Court for the Southern District of West Virginia in *Ohio Valley Envt. Coalition v. Horinko*, 279 F. Supp. 2d 732, that "antidegradation reviews must be done even for general permits," although the District Court recognized the EPA was unclear how such a mandate would be implemented. Even if Congress or the EPA enacts new requirements for site-specific, antidegradation reviews of discharges under general permits, no such requirements existed at the time the IDEM approved the Modifications. The District Court's decision has no binding effect, and the court finds its decision does not apply to the facts and law in this case.

41. The ELJ noted 327 IAC 2-1-2 was repealed in 2012 and replaced by 327 IAC 2-1.3-1(c), which provides:

> The antidegradation implementation procedures for activities covered by an NPDES general permit authorized by the department apply according to the following:
> (1) The department shall complete an antidegradation review of the NPDES general permits.
> (2) After an antidegradation review of an NPDES general permit is conducted, activities covered by that NPDES general permit are not required to undergo an additional antidegradation review.

The ELJ properly observed "the current rule was not in effect at the time that the Modification was issued and is not conclusive regarding this issue." OEA Order, Conclusions Nos. 39 and 40, p. 16. How Indiana will implement 40 CFR 131.12 remains to be seen but must occur through legislative action and rulemaking and will be administered by the IDEM in due course. This court cannot and will not apply Indiana's new rule to the Modifications retroactively.

42. This court cannot agree with the ELJ's conclusion it is "relatively clear" that site-specific, antidegradation review is required for the Modifications. Peabody followed the proper procedure to modify its general permit, and the IDEM, in its sound discretion, determined there was no reason to require an individual NPDES permit or to conduct site-specific, antidegradation analysis for the Modifications in the absence of any evidence the Modifications would diminish

water quality. Contrary to the Sierra Club's assertions, 327 IAC 15-2-9(b)(1) may not be used in this case to require individual NPDES permits or site-specific, Tier II antidegradation review of discharges authorized under a general permit. The court AFFIRMS the ELJ's conclusion to remand the Modifications to the IDEM but VACATES the ELJ's finding for the Sierra Club on summary judgment. The IDEM is ORDERED to conduct any antidegradation review of the Modifications pursuant to the rules in effect at the time the Modifications were approved and consistent with the requirements of Rule 7 and the general permit program.

JUDGMENT

Based on the foregoing findings of fact and conclusions of law, the court AFFIRMS the OEA's Findings of Fact, Conclusions of Law and Partial Final Order on Motions for Summary Judgment issued on September 11, 2013, on Counts 1, 2, 4, 5, and 6 and VACATES the OEA's grant of summary judgment on Count 3. The court REMANDS this matter to the IDEM to conduct the antidegradation review directed by the OEA but clarifies the review shall be conducted pursuant to the requirements of Indiana's NPDES general permit program and the provisions of Rule 7, as intended by our Legislature and as provided in rule. Nothing in this order shall require the IDEM to conduct a site-specific, Tier II antidegradation review of the Peabody Discharges unless the IDEM determines it is warranted due to changes in the character or composition of the Discharges or evidence of actual violations of the Clean Water Act.

SO ORDERED this 23rd day of September, 2015.

Judge David Certo
Marion Superior Court,
Environmental Division

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