

**OBJECTION TO THE DENIAL OF  
CONTAINED-IN GROUNDWATER DETERMINATION  
VOLUNTARY REMEDIATION PROGRAM (“VRP”)  
VRP SITE NO. 6071001, EPA ID NO. IND040289357  
HAGERSTOWN LAND, LLC  
2023 OEA 069, OEA CAUSE NO.: 21-S-J-5144**

<b>Official Short Cite Name:</b>	HAGERSTOWN LAND, 2023 OEA 069
<b>OEA Cause No.:</b>	21-S-J-5144
<b>Topics/Keywords:</b>	SUMMARY JUDGMENT NON-RULE POLICY CONTAINED-IN POLICY CONTAINED-IN DETERMINATION ENVIRONMENTAL MEDIA PURGE WATER DECONTAMINATION WATER TRICHLOROETHYLENE (TCE) CHROMIUM VOLUNTARY REMEDIATION PROGRAM 40 CFR Part 261, Subpart C 40 CFR Part 261, Subpart D 40 CFR 261.2 40 CFR §261.3 40 CFR §261.3(a)(2)(iv) 40 CFR Part 261.31 329 IAC 3.1 IC § 4-21.5-3-27(d) IC § 4-21.5-7-3 IC § 4-21.5-3-23 IC § 4-22-1 IC § 13-11-2-99 IC § 13-13 et seq. IC § 13-14-1-11.5 Ind TR 56(C)
<b>Presiding ELJ:</b>	LORI KYLE ENDRIS
<b>Party Representatives:</b>	LISA MCCOY, ESQ., IDEM DAVID HATCHETT, ESQ., PETITIONER THOMAS BAKER, ESQ., PETITIONER
<b>Date of Final Order:</b>	FEBRUARY 8, 2023
<b>Index Category:</b>	SOLID WASTE

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<b>Further Case Activity:</b>	<p>Feb 08, 2023: Issued the Amended Final Order of Stipulation of Dismissal at <b>2023 OEA 071</b>.</p> <p>Dec 17, 2021: OEA Issued Findings of Fact, Conclusions of Law, and Order at <b>2023 OEA 073</b>.</p>
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# INDIANA OFFICE OF ENVIRONMENTAL ADJUDICATION

Mary L. Davidsen, *Chief Environmental Law Judge*  
Lori Kyle Endris, *Environmental Law Judge*  
Sara C. Blainbridge, *Legal Administrator*

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

BEFORE THE INDIANA OFFICE OF  
ENVIRONMENTAL ADJUDICATION

CAUSE NO. 21-S-J-5144

OBJECTION TO THE DENIAL OF            )  
CONTAINED-IN GROUNDWATER DETERMINATION    )  
VOLUNTARY REMEDIATION PROGRAM ("VRP")        )  
VRP SITE NO. 6071001                                )  
HAGERSTOWN LAND, LLC                                )  
EPA ID NO. IND040289357                            )  
HAGERSTOWN, WAYNE COUNTY, INDIANA            )

\_\_\_\_\_  
Hagerstown Land, LLC,                                )  
    Petitioner,    )  
    v.    )  
Indiana Department of Environmental Management,    )  
    Respondent.    )

## **AMENDED FINAL ORDER OF STIPULATION OF DISMISSAL**

This matter came before the Office of Environmental Adjudication (OEA or Court), by the Indiana Department of Environmental Management (IDEM) and Hagerstown Land, LLC (Hagerstown Land) (collectively the Parties) legal counsels, on their February 8, 2023 Agreed Entry and Joint Stipulation for Dismissal, which document is now a part of OEA's record.

The Parties agreed to settlement of this matter as follows:

1. The litigation involves IDEM's partial denial (Determination) of Hagerstown Land's request for contained-in status under IDEM's Contained-in Determination Policy, a nonrule policy document<sup>1</sup> for certain investigation-derived wastes generated as part of Hagerstown Land's environmental remediation activities at the Former Dana Perfect Circle Facility in Hagerstown, Wayne County, Indiana.

<sup>1</sup> WASTE-0061, 20150610-IR-318150158NRA (June 10, 2015).

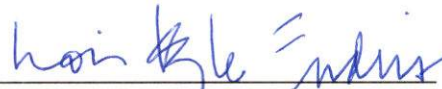
2. Although the Parties continue to disagree about the propriety of IDEM 's Determination, the Parties have agreed to resolve this matter without further litigation. The Parties agree the settlement will promote judicial economy, will conserve the Parties' resources, and is otherwise in their best interests.

3. IDEM agrees that to the extent the containers identified as drum numbers DM-3Q-117-2020 and DM-3Q-118-2020 and their contents were not accumulated in accordance with applicable RCRA regulations, IDEM agrees to exercise its discretion and shall not initiate or maintain any enforcement action concerning containers identified as drum numbers DM-3Q-117-2020 and DM-3Q-118-2020 and their contents.

**AND THE COURT**, being duly advised and having considered the parties' February 8, 2023 Agreed Entry and Joint Stipulation for Dismissal, now **FINDS** that pursuant to 315 IAC 1-3-7 and 315 IAC 1-3-8, the Agreed Entry and Joint Stipulation for Dismissal shall be **GRANTED** and the Petition for Administrative Review hereby **VACATED**.

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

**IT IS SO ORDERED** this 8th day of February, 2023 in Indianapolis, IN.



Hon. Lori Kyle Endris  
Environmental Law Judge  
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**DISTRIBUTION VIA EMAIL**

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2. The Environmental Protection Agency (“EPA”) has several lists of specific “listed” hazardous wastes which are codified under its Resource Conservation and Recovery Act (“RCRA”). 40 CFR Part 261, Subpart D. EPA also has rules providing that any solid waste which demonstrates any one of four characteristics--ignitability, corrosivity, reactivity, and extraction procedure toxicity--will be considered a “characteristic” hazardous waste. 40 C.F.R. Part 261, Subpart C.
3. In Indiana, IDEM is authorized to operate its own RCRA hazardous waste program because EPA delegated its primary responsibility to manage the program to IDEM under its hazardous waste management rules at 329 Ind. Admin. Code 3.1.
4. Groundwater at the Site is contaminated with trichloroethylene (“TCE”) and chromium. TCE is a F001 listed hazardous waste under RCRA. 40 C.F.R. §261.31<sup>2</sup>.
5. IDEM’s “Contained-in Determination” Policy (Policy) was issued as a nonrule policy in compliance with Ind. Code § 13-14-1-11.5 and became effective on October 17, 2002, as WASTE-0061-NPD. The Policy was revised in 2015, 20150610-IR-318150158NRA (Jun. 10, 2015), to replace references from a former RISC guidance document to the new Remediation Closure Guide (“RCG”) following the enactment of legislation requiring risk-based cleanups. The Policy was based on EPA’s Contained-in Policy, Federal Register Vol. 63, No. 229 (November 30, 1998). *See also* [https://www.epa.gov/sites/default/files/2016-04/documents/01\\_12cntdin\\_1.pdf](https://www.epa.gov/sites/default/files/2016-04/documents/01_12cntdin_1.pdf).
6. A “nonrule policy document” is an IDEM term assigned to policies identified under I.C. § 13-14-1-11.5 as any policy “that interprets, supplements, or implements a statute or rule; has not been adopted in compliance with I.C. § 4-22-1; is not intended by IDEM to have the effect of law; and does not apply to IDEM’s internal organization.” I.C. § 13-14-1-11.5.
7. The Policy provides the “site-specific, media-specific, and contaminant-specific health-based criteria to determine when listed hazardous waste is not ‘contained-in’ environmental media.” *Policy, section 1.0*. The applicability of the Policy is limited to listed waste constituents contained in environmental media. To be eligible under the Policy, TCE waste must meet certain exit limits or criteria to be eligible for the exclusion: 19000 micrograms per liter (µg/L) for TCE. The contained-in waste must also meet the toxicity characteristic limit of 500 µg/L.

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<sup>2</sup> F001 is the listing code for hazardous waste classified as spent halogenated solvents used in degreasing that include tetrachloroethylene, trichloroethylene, methylene chloride, 1,1,1-trichloroethane, carbon tetrachloride, and chlorinated fluorocarbons. It includes spent solvent mixtures/blends used in degreasing containing, before use, a total of ten percent (10%) or more (by volume) of one or more of the listed halogenated solvents or those solvents listed in F002, F004 and F005. *See* 40 CFR 261.31 Subpart D.

8. Under section 5 Roles, the Policy requires the site owner/consultant/operator or whomever requests a “contained-in” determination to conduct a waste determination/characterization of the environmental media, specific to the “contained-in” determination. • Delineate areas to be removed as part of remediation removal and provide the volumes of material to be managed under this policy. Amounts of environmental media generated as investigation derived wastes (“IDW”) should be included in the “contained-in” request. • Sample and analyze the environmental media to determine if it has been impacted with listed hazardous wastes and/or if the environmental media exhibits hazardous waste characteristics. This will require collecting and analyzing representative samples of the environmental media in accordance with SW846 or other accepted methods and standards. • Identify the hazardous waste listing codes to be considered for the ‘contained-in’ determination. • Identify any hazardous waste characteristics exhibited in the environmental media considered for the ‘contained-in’ determination. • Determine the concentration of the contaminants of concern in the environmental media and how those levels compare to the Screening Levels contained in the Remediation Closure Guide. • Submit a request for the environmental media to be exempted from being a hazardous waste through the “contained-in” determination process. *Policy, section 5.1.*
9. The Policy further states “at a minimum, the request should include 1) A cover letter indicating the proposed “contained-in” request; 2) A completed ‘Contained-in Checklist’; 3) Laboratory analytical results including analytical data submitted in support of a “contained-in” determination listed for Full QA/QC in Section 3.9, Table 3-A of the Remediation Closure Guide; and 4) Map(s) indicating sample locations and points of generation.” *Id.*
10. On November 13, 2018, HLL submitted its initial Contained-in Request for Exclusion of Potentially Listed Hazardous Waste (2018 Request) to IDEM.
11. On November 14, 2018, IDEM’s Contained-in Determination (2018 Determination) granted HLL’s request for both existing listed IDW<sup>3</sup> and future generated listed IDW be excluded as hazardous waste. The 2018 Determination expired November 14, 2020.
12. For future generated IDW, the 2018 Determination required “representative sampling<sup>4</sup> and analysis to be conducted on all IDW contaminated soil and IDW contaminated groundwater generated at this site to confirm applicable default levels are met and sampling of IDW contaminated groundwater must be done prior to solidification if disposed in a landfill.” See 2018 Determination, p. 4.

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<sup>3</sup> The generation of listed constituents contained in soil and groundwater during remediation activities is referred to as IDW.

<sup>4</sup> In its Guidance on Choosing a Sampling Design for Environmental Data Collection for Use in Developing a Quality Assurance Project Plan, EPA QA/G-5S (2002), EPA defines representativeness as “a measure of the degree to which data accurately and precisely represent characteristics of a population, parameter variations at a sampling point, a process condition, or an environmental condition.” *Id.* at p. 158.

13. The monitoring well sampling process utilized by HLL's project manager for the VRP first involves purging the monitoring well, i.e., extracting approximately three (3) to five (5) gallons of water that has collected in the well to ensure that the groundwater extracted for testing is representative of surrounding conditions. This "purge water" is secured in a container for disposal. A sample of the groundwater is then removed and sent to a lab for analysis. See Bryan Aff. ¶¶ 11 – 12.
14. Equipment and instruments that are exposed to purge or sample water during the purging and sampling processes are "decontaminated to remove...contaminated groundwater still in or on the equipment. [The decontamination occurs] by running tap or bottled water with detergent through or over the equipment followed by a rinsing with deionized water. The used detergent-water solution and used deionized water make up 'decon water' which is then placed in a container for disposal." *Id.* at ¶¶ 14 – 15.
15. On May 5 – 6, 2020, purge water and samples were collected from monitoring wells MW-03, -04, -04A, -06, -10, -11, and -12 and placed into container DM-3Q-117-2020 along with the decon water created from cleaning the equipment used for sampling. *Id.* at ¶¶ 18, 20.
16. On May 19, 2020, purge water in the container labeled DM-3Q-118-2020 was collected from monitoring wells GW-04, -89, -93 and -109. The sampling data HLL submitted in its 2021 Request for container DM-3Q-118-2020 reflected F001 waste but revealed that the samples had not been analyzed for TCE. *Id.* at ¶¶ 22-23.
17. HLL stated that samples from May 19 sampling "were analyzed for only chromium...in response to IDEM requests to confirm the extent of chromium contamination in groundwater and to assist in demonstrating to IDEM that the contaminant was sufficiently addressed." HLL neither provided documentation of the requests nor documentation that the requests obviated the need for it to have the decon water analyzed for TCE on May 19, 2020.
18. On March 30, 2021, HLL submitted its Contained-in Request for Exclusion of Potentially Listed Hazardous Waste (2021 Request) to IDEM seeking a Determination that 13 containers of existing listed F001 IDW met the criteria under the IDEM's Policy and a continuous Determination for future IDW-listed waste. In its Request, HLL characterized the IDW generated from purging monitoring wells as hazardous because it contained constituents of TCE and sought a determination from IDEM that the purge water taken from the groundwater wells did not contain F001 constituents at levels that would make them hazardous. See 2021 Request.
19. In its April 23, 2021, Determination IDEM found that eleven (11) of the thirteen (13) containers met the criteria under the Policy and thus were not required to be regulated as



hazardous waste. IDEM denied applicability of its Policy to two (2) containers designated as DM-3Q-117-2020 and DM-3Q-118-2020. See 2021 Determination at 2-3.

20. With respect to container DM-3Q-117-2020, IDEM determined that “Container DM-3Q-117-2020 was identified as containing ‘decon’ water. Decon water is not an environmental media as identified in IDEM’s ‘Contained-in’ Policy and cannot be addressed under the...policy.” *Id.*
21. With respect to container DM-3Q-118-2020, IDEM determined that “Container DM-3Q-118-2020 was identified as containing purge water from monitoring wells GW-04<sup>5</sup>, GW-89, GW-93 and GW-109. The groundwater associated with these wells...was analyzed for metal content only. The groundwater generated from those monitoring wells was not analyzed for F001 constituents. Groundwater from these monitoring wells had previously been analyzed for F001 constituents but was [sic] the groundwater pending disposal had not been completely characterized.” *Id.*
22. As to both containers, IDEM’s Determination concluded “The groundwater in Container DM-3Q-117-2020 and Container DW-3Q-118-2020 cannot be addressed using the ‘contained-in’ policy and remains F001 hazardous waste.” *Id.*
23. IDEM issued HLL’s requested Continuing Determination for Future Listed IDW Groundwater for the constituents of concern contingent upon a demonstration that the chemicals of concern met or were below the standards in the Policy and were either disposed of at a unit regulated under the Clean Water Act or a municipal solid waste landfill depending on the sample results. *Id.*
24. HLL submitted supplemental information (Supplement) to IDEM by letter dated May 4, 2021. In its Supplement, HLL asked IDEM to reconsider its Determination as to container DM-3Q-117-2020 that “decontamination water was not environmental media” because “that issue is not necessary to exclude the decon water from hazardous waste status.” HLL contended the “decon water is not a hazardous waste because it was never exposed to or mixed with, or otherwise contaminated with hazardous waste.” See Supplement at 1.
25. With respect to container DM-3Q-118-2020, HLL conceded that the samples taken “were not analyzed for cVOCs” but contended that “[t]here is ample generator knowledge and/or representative sampling to establish that these samples meet the existing criteria under the...Policy” and asserted that the Policy does not specifically require every sample to be tested as long as “representative samples are analyzed.” *Id.* at 2.

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<sup>5</sup> Samples from monitoring well GW-04 have not been analyzed for TCE since 2011 because the well was determined to be outside of the TCE-impacted groundwater plume using a 5µg/L TCE concentration, IDEM’s drinking water standard. The documentation was included in HLL’s Voluntary Remediation Work Plan that received IDEM’s technical approval on September 20, 2021.

26. Thereafter, IDEM issued a letter dated May 7, 2021, titled *Dana Corporation Perfect Circle Contained-in Determination for Contaminated Groundwater Response to Comments* (Comments Letter) which maintained the denial of the application of the Policy to the two containers of waste and concluded the containers had to be treated as hazardous waste. *Id.*
27. On May 10, 2021, HLL filed a Petition for Administrative Review, Request for Hearing and Petition for Stay of Certain Conditions (“Petition”) of IDEM’s April 23, 2021, contained-in determination for contaminated groundwater and its May 7, 2021, Comments Letter. In its Petition, HLL challenged IDEM’s denial of the applicability of the Policy and its Determination that two (2) containers designated as DM-3Q-117-2020 and DM-3Q-118-2020 were subject to regulation as hazardous waste. HLL did not challenge the validity of the Policy.
28. On August 6, 2021, the parties filed a Joint Stipulation for Stay and Agreed Entry where HLL agreed to dispose of the disputed waste in the two containers as hazardous waste. IDEM agreed to stay the portions pertaining to the containers in its 2021 Determination and the Comments Letter in its entirety. The parties also filed a case management order to pursue the case on summary judgment.
29. On September 24, 2021, IDEM by counsel and with consent from HLL’s counsel, requested a 7-day extension of time to file cross-motions on summary judgment. That request was granted September 27, 2021.
30. On October 1, 2021, HLL filed its Motion for Summary Judgment and Memorandum in Support of Summary Judgment.
31. On October 1, 2021, IDEM’s counsel sent an email to OEA frontdesk which stated, “I decided not to file a cross-motion in this matter. I will respond to the Petitioner’s Motion as currently scheduled.” Thank you.
32. On November 1, 2021, IDEM filed its Response to Motion for Summary Judgment (Response). IDEM did not file a cross-motion for summary judgment. In its Response, IDEM did not submit depositions, answers to interrogatories, admissions on file, or affidavits. IDEM did not opine as to the existence of a genuine issue of material fact or file a statement of undisputed material facts in compliance with Ind. T. R. 56(C).

In its Response, IDEM stated, “[t]he material facts are not in dispute and the issue, which is whether IDEM’s Policy interpreting a regulation that the agency is tasked with implementing is a reasonable interpretation, is purely a question of law and appropriate for summary judgment.” IDEM also requested “the Court find, based upon the undisputed, material facts as applied to the laws and regulations, that judgment should be issued in IDEM’s favor

pursuant to Indiana Trial Rule 56.” IDEM cited no legal authority in support of its request that a Response could, without the supporting documents required to be submitted with a motion for summary judgment, be treated as a motion for summary judgment. The Response, as submitted, did not meet the requirements of Ind. T. R. 56(C).

33. On November 19, 2021, HLL filed its Reply in Support of its Motion for Summary Judgment to IDEM’s Response.

### CONCLUSIONS OF LAW

1. IDEM is authorized to implement and enforce Indiana environmental statutes and rules promulgated relevant to those laws. See I.C. § 13-13 *et seq.* and I.C. § 13-14-1-11.5. OEA has jurisdiction over the decisions of the Commissioner of the IDEM and the parties to the controversy pursuant to I.C. § 4-21.5-7-3. In the exercise of its jurisdiction, OEA is governed by the Administrative Orders and Procedures Act (AOPA) per I.C. § 4-21.5 *et seq.*, and OEA-specific rules per 315 I.A.C. 1, *et seq.*
2. This is an Order issued pursuant to I.C. § 4-21.5-3-23. Findings of Fact that may be construed as Conclusions of Law and Conclusions of Law that may be construed as Findings of Fact are so deemed.
3. The OEA must apply a *de novo* standard of review to this proceeding when determining the facts at issue. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993). Findings of fact must be based exclusively on the evidence presented to the ELJ, and deference to the agency’s initial factual determination is not allowed. *Id.*; I.C. § 4-21.5-3-27(d). OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Env’tl. Adjud.*, 811 N.E.2d 806 (Ind. 2004).
4. The OEA may enter summary judgment for a party if it finds “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits and testimony, if any, show that a genuine issue as to any material fact does not exist and that the moving party is entitled to judgment as a matter of law.” I.C. § 4-21.5-3-23. See also, Ind. T.R. 56(C). The moving party bears the burden to establish that summary judgment is appropriate, but all facts and inferences must be construed in favor of the nonmoving party. *Gibson v. Evansville Vanderburgh Building Commission, et al.*, 725 N.E.2d 949 (Ind. Ct. App. 2000).
5. The failure of the nonmoving party to offer evidence in opposition to the undisputed facts shown by the evidentiary materials or to designate facts establishing a question of fact for trial will permit summary judgment to be entered against it. *Ramon v. Glenroy Const. Co.*, 609 N.E.2d 1123 (Ind. Ct. App. 1993) *trans. denied*; see also, *Babinchak v. Town of Chesterton*, 598 N.E.2d 1099, 1102 (Ind. Ct. App. 1992). “The movant bears the burden of proving the propriety of summary judgment, and all rational assertions of fact and

reasonable inferences ...are deemed to be true and are viewed in the nonmovant's favor." *Lindsey v. DeGroot*, 898 N.E.2d 1251, 1256 (Ind. Ct. App. 2009)<sup>6</sup>.

6. The failure to challenge an affidavit during a summary judgment proceeding "means that the facts therein are admitted." *Criss v. Bitzegaio*, 420 N.E.2d 1221, 1224 (Ind. 1981). A failure to respond effectively to a motion for summary judgment does not automatically entitle HLL to judgment. *Id.* OEA must determine whether the facts which were established and are without dispute are sufficient to establish the moving party's claim. *Id.* "Summary judgment shall not be granted as of course because the opposing party fails to offer opposing affidavits or evidence, but the court shall make its determination from the evidentiary matter designated to the court." Ind. Tr. R. 56(C).
7. The power of an administrative agency to administer a created program necessarily requires the formulation of policy and the making of rules to fill any gap. *NRDC v. POET Biorefining-North Manchester, LLC*, 15 N.E.3d 555 (Ind. 2014). Here, neither EPA nor Indiana regulations directly address the issue of characterizing listed waste once it is released to the environment, mixed with soil or groundwater, and generated as IDW. IDEM's Policy is intended to provide guidance for determining when a listed waste mixed with soil or groundwater meets the definition of hazardous pursuant to I.C. § 13-11-2-99 and 40 CFR §261.3.
8. The Indiana Court of Appeals "has observed that not every bit of agency policy needs to be placed in a published rule, where there is no legislative requirement to do so." See *Gorka v. Sullivan*, 671 N.E.2d 122, 129 (Ind. Ct. App. 1996), *trans. denied*; *Dennistar Environmental Inc. v. Ind. Dept. of Env'tl. Mgm.t*, 741 N.E.2d 1284, 1288 (Ind. Ct. App. 2001).

Container DM-3Q-117-2020:

9. With respect to container DM-3Q-117-2020 HLL disagrees with IDEM's Determination that "decon water is not environmental media... [and states] but that issue is not necessary to exclude the decon water from hazardous waste status." HLL contends "the decon water is not a hazardous waste because it was never exposed to or mixed with, or otherwise

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<sup>6</sup> HLL pinpoint cites *Lindsey v. DeGroot*, 898 NE2d 1251, 1261 (Ind. Ct. App. 2009) for the proposition that "In the environmental law context, if a non-movant fails to designate sampling results contrary to environmental data designated by the movant, the Court should accept the movant's designated evidence as true." The Court of Appeals actually held because "the Lindseys did not designate any evidence to support an inference that the alleged statutory violations had affected their groundwater supply in any way..., failed to counter DeGroot Dairy's designated evidence which established that the Lindseys had tested their water supply on two separate occasions, and both of these tests were negative for any contamination, [and]... failed to designate any evidence suggesting that the alleged statutory violations were the proximate cause of their claimed injury," the Lindseys "failed to demonstrate a genuine issue of material fact supporting their contention that the statutory violations alleged in the preliminary injunction were the proximate cause of their claimed injury." *Id.* It is difficult to discern how HLL was able to extrapolate its proposition from what the Court actually stated.

contaminated with hazardous waste.” HLL cited no legal authority for its contention that environmental media mixed with anything other than environmental media was acceptable under the Policy. Contrary to HLL’s position, the issue of determining whether decon water is environmental media is necessary to determine whether the Policy applies. To make its Determination IDEM first must determine whether the contents of container DM-3Q-117-2020 were environmental media. Because the Policy defines environmental media as “naturally occurring soil and groundwater,” the decon water, created by “running tap or bottled water with detergent through or over the equipment, then rinsing it with deionized water” was not naturally occurring soil or groundwater and thus not environmental media making the Policy inapplicable to the contents of the container.

10. HLL’s contention that no part of the decon water was ever hazardous waste is untenable without support for that contention. Decon water is created by decontaminating equipment used in testing the groundwater for hazardous waste “to remove the small amount of contaminated groundwater still in or on the equipment.” Bryan Aff. ¶ 15. Moreover, EPA recognizes decon water as potential IDW. *Management of Investigated Derivative Waste Operating Procedures*, LSASDPROC-202-R4 (2020); see also *Guide to Management of IDW*, 9345.3-03FS (1992). “To determine the ultimate disposition of IDW, it is typically distinguished as being either hazardous or non-hazardous and is based on either clear regulatory guidance or by subsequent analysis.” *Management of Investigated Derivative Waste Operating Procedures*, p. 4. HLL neither claimed to have tested the decon water nor provided analysis of such testing to IDEM in its 2021 Request. In the absence of documentation and the affiant’s statement regarding HLL’s process in decontaminating equipment and instruments, HLL did not prove “the decon water is not a hazardous waste.”
11. HLL contends that the decon water in container DM-3Q-117-2020 “was generated from cleaning the equipment that only came into contact with groundwater that met the exit criteria established in both the 2018 and 2021...determinations and thus should not be treated as hazardous waste.” (Emphasis original). It is not accurate to state the decon water was generated from “cleaning the equipment that only came into contact with groundwater” because “[t]he decon water that was included in drum DM-3Q-117-2020 consisted solely of such groundwater, *plus the used detergent-tap or -bottled water wash, and the deionized water rinse.*” Bryan Aff. at ¶ 21. (Emphasis original. Even assuming that the contents of the container met the exit criteria established in 2018, that Determination expired prior to HLL’s submitting its 2021 Request. Moreover, the 2021 Request could not have met the 2021 Determination as IDEM denied application of the Policy to the container in 2021.

12. HLL contends that the mixture rule does not apply because the purge water was found to meet the exit criteria in 2018<sup>7</sup>, and the decon water was “clearly not hazardous waste.” The Policy states that “all approvals for reoccurring investigative derived ‘contained-in’ wastes expire two calendar years after the date of issuance and require a resubmittal for consideration of continued approval at the completion of the two-year period.” Policy at 6.2.

13. In its Reply in Support of its Motion for Summary Judgment, HLL also contends “the mixture rule only applies if one component of the mixture is a hazardous waste” and “[i]t does not matter whether the decon water is environmental media because it was a mixture of two materials that were not hazardous wastes: contaminated groundwater (excluded from being hazardous waste by operation of the contained-in determinations) and soapy water (clearly not hazardous waste).” Reply at 2. HLL cited no legal authority that supports “it does not matter whether the decon water is environmental media because it was a mixture of two materials that were not hazardous wastes.” Until IDEM could make its determination, the purge water in the container was considered hazardous waste.

Found at 40 C.F.R. §261.3(a)(2)(iv) and adopted by Indiana at 329 I.A.C. 3.1, the hazardous waste “mixture rule” states that if a listed hazardous waste is mixed with any other solid waste, the entire mixture is considered a listed hazardous waste. Solid waste is defined at 40 CFR 261.2, in part, as any discarded material that is abandoned to be disposed. Once the listed waste (TCE contaminated groundwater) and solid waste (decon water) were mixed, the entire mixture was considered a listed hazardous waste and was required to be regulated under RCRA for disposal. Stated another way, when added to the purge water the decon water changed the composition of the container’s contents such that the remaining mixture was not environmental media and was therefore required to be treated as hazardous.

14. Because HLL’s designated evidence failed to demonstrate that the waste in the container was exempt from RCRA, HLL is not entitled to summary judgment on IDEM’s Determination regarding container DM-3Q-117-2020. IDEM is not entitled to summary judgment because it chose not to file a cross motion for summary judgment, did not cite legal authority indicating that its Response could be considered by the Court a motion for summary judgment and did not comply with Ind. T. R. 56(C).

Container DM-3Q-118-2020:

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<sup>7</sup> At the time of HLL’s 2021 Request for Contained-in Determination, its 2018 Determination had expired; thus, at the time of the Request, the purge water was still considered a listed hazardous waste until IDEM could otherwise make a determination.

15. In its 2021 Request HLL represented that Container DM-3Q-118-2020 no longer contained listed F001 hazardous waste and was exempt from regulation under RCRA. 2021 Request §3. It was for these constituents that HLL was requesting IDEM make its Determination. This container was filled with the purge water after HLL performed sampling of additional monitoring wells GW-04, GW-89, GW-93 and GW-109 on May 19, 2020. The May 19, 2020, samples were only analyzed for chromium. HLL's project manager stated "[t]hese four wells were sampled for chromium in response to IDEM requests to confirm the extent of chromium contamination in groundwater and to assist in demonstrating to IDEM that that contaminant was sufficiently addressed." Bryan Aff. ¶ 22. HLL did not provide documentation of IDEM's requests or demonstrate that the requests obviated the need for it to test for TCE. Moreover, HLL did not explain why it did not test for TCE although it claimed the container had this listed waste in its 2021 Request.
16. IDEM determined that container DM-3Q-118-2020 did not meet the criteria under its Policy because the groundwater from four (4) monitoring wells was analyzed for metal (chromium) content but not for F001 constituents (TCE). "Groundwater from these monitoring wells had previously been analyzed for F001 constituents but was [sic] the groundwater pending disposal had not been completely characterized." 2021 Determination at p. 2. HLL contends that groundwater samples not tested for TCE constituents can be demonstrated to meet exit criteria through other means.
17. Under Section 5.1<sup>8</sup> the Policy, among other requirements, requires the site owner/consultant/operator or whomever requests a contained-in determination to "sample and analyze the environmental media to determine if it has been impacted with listed hazardous wastes and/or if the environmental media exhibits hazardous waste characteristics. This will require collecting and analyzing representative samples of the environmental media in accordance with SW846<sup>9</sup> or other accepted methods and standard." Policy, section 5.1. Whomever requests the determination must also "determine the concentration of the contaminants of concern in the environmental media and how those levels compare to the Screening Levels contained in the [agency's] RCG." *Id.* At a minimum the contained-in request "should include [l]aboratory analytical results. Analytical data submitted to IDEM in support of a 'contained-in' determination should include the items listed for Full QA/QC in Section 3.9, Table 3-A of the Remediation Closure Guide." *Id.* Section 3.9 of IDEM's Remediation Closure Guide states, "[a]nalytical documentation necessary to evaluate data will depend on the intended use(s) of the data. In general, reporting limits and detection limits, along with actual sample results and associated qualifiers, are essential to data interpretation." Remediation Closure Guide, p.

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<sup>8</sup> IDEM cites the Policy, section 6, as requiring "[t]he waste must be demonstrated, through sampling and analysis, that the concentration of the specific constituent which makes the waste listed, is below the direct contact commercial/industrial levels in Table A-6 of the Remediation Closure Guide (RCG)" but section 6 does not contain that wording or that requirement.

<sup>9</sup> SW846 are Test Methods for Evaluating Solid Waste: Physical/Chemical Methods Compendium, "EPA's official collection of methods for use in complying with RCRA regulations."

43. At the time of its 2021 Request, HLL did not submit a sample or analysis of the environmental media to determine if it had been impacted with listed hazardous wastes and/or if the environmental media exhibited hazardous waste characteristics.

18. In his affidavit HLL's project manager states that "[m]ultiple sampling events were completed at monitoring wells GW-89, GW-93 and W-109 between September 2018 and December 2020 that include analysis of TCE concentrations [and t]hese results are contained in Table 8A<sup>10</sup>" as an exhibit to his affidavit. Bryan Aff. ¶ 24. While not referenced in the affidavit, results found in a document titled Table 2<sup>11</sup> reflect that GW-89, GW-93 were tested on June 17 and December 15, 2020. GW-109 was tested on April 22, June 18, September 8, and December 15, 2020. None of these results were submitted with HLL's 2021 Request. None of these results represent the purge water that was placed in container DM-3Q-118-2020 on May 19, 2020.
19. In its May 4, 2021, Supplement to IDEM in response to the agency's Determination, HLL stated, "[a]lthough these specific samples were not analyzed for cVOCs, there is ample generator knowledge and/or representative sampling to establish that these samples meet the exit criteria under the Contained-in Policy and are not hazardous wastes." Supplement, p. 2. HLL acknowledged that it did not comply with Section 5 of the Policy, but asked IDEM to reconsider its Determination because the "Contained-in Policy does not specifically require every sample to be tested, as long as 'representative samples' are analyzed." *Id.* HLL did not submit documentation of representative samples with its 2021 Request that showed the environmental media was "below contaminant of concern levels in Table A-6, Commercial/Industrial Levels of the RCG," and did "not exhibit a hazardous characteristic" as required by section 6.2 of the Policy to obtain Determination Approval.
20. HLL chose to submit container DM-3Q-118-2020 for consideration under the Policy but argues that it did not have to provide required documentation along with its submission and, instead, eleven (11) days after IDEM's Determination, proffered the agency results from samples taken before and after May 19, 2020, along with a statistical analysis of those samples. In the absence of required documentation submitted to IDEM at the time of HLL's 2021 Request, IDEM was neither obligated to reconsider its Determination that the Policy did not apply to DM-3Q-118-2020 nor extrapolate data supplied by an applicant after IDEM's Determination had been made.
21. HLL contends that the statistical analysis of the sampling results concluded that "based on a 95% confidence interval that TCE levels in each of the three wells (GW-89, GW-93, and GW-109) can be reliably expected to be less than 25µg/L or twenty times lower than the standard 500µg/L exit criteria for a contained in determination." Bryan Aff. ¶ 25. HLL's

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<sup>10</sup> Table 8A only reflects sampling events for GW-04. The sampling for this monitoring well ceased in 2011 because it "was determined previously to be outside of the TCE-impacted groundwater plume as delineated by AECOM using a 5µg/L TCE concentration, which is IDEM's drinking water standard." Bryan Aff. ¶ 26.

<sup>11</sup> Table 2 was an exhibit to HLL's Supplement.



project manager also stated, that “[d]rum DM-3Q-118-2020 was recently sampled, and those results did not detect any TCE” and included the results as exhibit 5<sup>12</sup> to the affidavit. *Id.* at ¶ 29. The exhibit was dated two (2) months after HLL submitted its Supplement to IDEM to reconsider its Determination.

22. Moreover, HLL cited no legal authority that

- samples taken before and after May 19, 2020, provided undisputable facts regarding the concentration levels of TCE constituents in the container’s contents on May 19, 2020;
- a 95% confidence interval calculation about the levels of TCE in each of the three wells constitute a representative sample;
- a 95% confidence interval calculation is sufficient to overcome the Policy’s requirements under section 5.1 that “whomever requests a ‘contained-in’ determination shall sample and analyze the environmental media to determine if it has been impacted with listed hazardous wastes and/or if the environmental media exhibits hazardous waste characteristics [which] will require collecting and analyzing representative samples” or include the laboratory analytical results that “should include the items listed for Full QA/QC in Section 3.9, Table 3-A of the Remediation Closure Guide;” and
- the environmental media can consist of any percentage less than what is required by section 6.2 of the Policy.

#### **ORDER**

**AND THE COURT** being duly advised, **FINDS** that HLL failed to meet its burden of proof in challenging Respondent IDEM’s Determination on Summary Judgment and therefore, HLL’s Motion for Summary Judgment is hereby **DENIED**. The Court also **FINDS** that IDEM’s request in its Response to be treated as a Motion for Summary Judgment is hereby **DENIED**.

The Parties are hereby **ORDERED** to submit a Proposed Case Management Order on January 14, 2022.

**IT IS SO ORDERED this 16<sup>th</sup> day of December, 2021 in Indianapolis, IN.**

Hon. Lori Kyle Endris  
Environmental Law Judge

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<sup>12</sup> The results in Exhibit 5 to the Affidavit consisted of one page, marked “Page 5 of 7,” are dated July 2, 2021, and reflect no results for trichloroethylene or trichloroethene.

