BEFORE THE
NATURAL RESOURCES COMMISSION
OF THE
STATE OF INDIANA

IN THE MATTER OF:

GIBSON COUNTY COAL, LLC,	)	**Administrative Cause**
Petitioner,	)	**Number: 22-069G**
	)	
vs.	)	
	)	
DEPARTMENT OF NATURAL RESOURCES,	)	**Permit Nos. 56148, 56149,**
And PIONEER OIL COMPANY, INC.,	)	**56150, 56157, 56158 and 56159**
Respondents.	)	

ORDER DENYING GIBSON COUNTY COAL'S MOTION FOR SUMMARY JUDGMENT AND GRANTING SUMMARY JUDGMENT IN FAVOR OF THE DEPARTMENT OF NATURAL RESOURCES AND PIONEER OIL COMPANY, INC. WITH FINDINGS OF FACT, CONCLUSIONS OF LAW, AND NONFINAL ORDER

Procedural Background and Jurisdiction

1. On December 22, 2022, Gibson County Coal, LLC (hereinafter GCC) filed a Petition for Administrative Review (hereinafter Petition) with the Natural Resources Commission (hereinafter Commission). GCC requests an order revoking the decision by the Department of Natural Resources (Department) to issue six permits to Pioneer Oil Company (Pioneer). See Petition.
2. By filing the Petition, Petitioner initiated a proceeding governed by Indiana Code 4-21.5-3, sometimes referred to as the Administrative Orders and Procedures Act (AOPA) and the administrative rules adopted by the Commission at 312 IAC 3-1 to assist with the implementation of AOPA. See IC 4-21.5-3-1, et seq.
3. The Department has been granted regulatory authority over oil and gas wells, including permitting authority pursuant to Ind. Code § 14-37.
4. The Commission is the ultimate authority of the Department. I.C. § 14-10-2-3.
5. The Commission possesses jurisdiction over the subject matter and the persons in this matter.

6. Administrative Law Judge (ALJ) Elizabeth Gamboa was appointed under IC 14-10-2-2 to conduct this proceeding and was assigned this case on January 3, 2023.
7. The Department of Natural Resources (Department) and Pioneer were notified of the Petition when the Commission issued a Notice of Telephonic Prehearing Conference on January 3, 2023. A Telephonic Prehearing Conference was scheduled for January 26, 2023.
8. Ihor Boyko filed an Appearance of Counsel for the Department on January 4, 2023. Stephen Link filed an appearance on behalf of Pioneer on January 10, 2023.
9. By agreement of the parties at the January 26, 2023 Prehearing Conference, an administrative review hearing was scheduled for December 6 and 7, 2023. Additionally, a deadline of April 28, 2023 was established for the filing of dispositive motions at the January 26, 2023 prehearing conference. That deadline was eventually extended to June 30, 2023 at the request of the parties.
10. Pioneer filed an answer to GCC's petition on February 22, 2023. Pioneer disputed some of the allegations in GCC's petition and answered that GCC was not entitled to an order revoking the permits issued by the Department to Pioneer. See Answer of Respondent Pioneer Oil Company Inc. to Petition for Administrative Review (Pioneer Answer).
11. Pioneer filed a Motion for Judgment on the Pleadings on June 14, 2023 in which it argued the permits were properly issued to Pioneer and that Pioneer should be granted judgment on the pleadings.
12. The Department filed a Motion to Dismiss on June 30, 2023. The Department argued that because the definition of "waste" was amended by the Indiana legislature effective January 1, 2023, GCC's argument that the permits would result in waste being committed by Pioneer, GCC's petition was moot. See Motion to Dismiss Appeal as Moot.
13. GCC filed a Motion for Summary Judgment (Motion) on June 30, 2023. GCC supported the Motion with the Affidavit of John Henderson (Henderson Affidavit). The following documents were attached to the Henderson Affidavit: Exhibit A, GCC's written objections to the permits for "Marvel #1, #2, and #3 Wells" dated June 30, 2022; Exhibit B, GCC's written objections to the permits for "Heidenreich #1, #2 and #3 wells" dated July 26, 2022; Exhibit C, GCC's supplemental comments submitted to the Department after the informal hearing was conducted; and Exhibit D, Findings of Fact, Legal Conclusions, and

Determination of Informal Hearing under 312 IAC 29-3-4 issued by the Department on December 7, 2022.

14. A briefing schedule for the dispositive motions was established by order dated July 6, 2023. The parties were given until July 31, 2023 to file responses to the motions and until August 15, 2023, to file replies to the responses.
15. On July 31, 2023, Pioneer filed a response in opposition to GCC's motion for summary judgment. Pioneer filed the affidavits of Brandi Stennett and John Brooke in support of its response to GCC's motion for summary judgment.
16. Also on July 31, 2023, GCC filed a combined response to Pioneer's motion for judgment on the pleadings and the Department's motion to dismiss.
17. The Department filed its Response to GCC's Motion for Summary Judgment and a designation of material in support of its response on July 31, 2023.
18. On August 23, 2023, the Department filed a reply to GCC's response to the Respondents' Dispositive Motions.
19. Pioneer filed a reply in support of its motion for judgment on the pleadings on August 25, 2023.
20. GCC filed a reply in support of its motion for summary judgment on August 25, 2023.

Pioneer's Motion for Judgment on the Pleadings

21. Pioneer argues GCC's Petition should be dismissed pursuant to Ind. Trial Rule 12(c) because GCC does not allege a sufficient basis to overturn the Department's decision to grant Pioneer the permits.
22. Unless inconsistent with AOPA or the administrative rules found at 312 Indiana Administrative Code (IAC) 3-1, the administrative law judge may apply the Indiana Trial Rules (T.R.) to the administrative proceedings. 312 IAC 3-1-10.
23. T.R. 8 requires that a claim for relief in civil court contain "a short and plain statement of the claim showing the pleader is entitled to relief and a demand for relief to which the pleader deems entitled."
24. A motion filed under T.R. 12, in turn, is a mechanism for challenging the legal sufficiency of complaint. A T.R. 12(c) motion for judgment on the pleadings

allows a party to request dismissal of a case at the initial stages of the proceedings. *Sims v. Beamer*, 757 N.E.2d 1021, 1024 (Ind. Ct. App. 2001).

25. AOPA's pleading requirements are much different than the requirements of T.R. 8. I.C. § 4-21.5-3-7 provides in relevant part:

> (a) . . . To qualify for review of any other order described in section 4, 5, or 6 of this chapter, a person must petition for review in a writing that does the following:
> (1) states facts demonstrating that:
> (A) the petitioner is a person to whom the order is specifically directed;
> (B) the petitioner is aggrieved or adversely affect by the order; or
> (C) the petitioner is entitled to review under any law.

26. The writing must be filed with the ultimate authority for the agency issuing the order within fifteen days after the person is given notice of the order or any longer period set by statute. I.C. § 4-21.5-3-7.
27. Pursuant to 312 IAC 3-1-3 "[a] proceeding before the commission under IC 4-21.5 . . . is initiated when . . . [a] petition for review is filed under IC 4-21.5-3-7."
28. Neither AOPA nor 312 IAC 3-1 provides a mechanism for dismissal similar to that provided in T.R. 12.
29. Pioneer does not argue GCC's Petition does not meet the requirements of I.C. § 4-21.5-3-7. Rather, Pioneer argues T.R. 12 should be applied pursuant to 312 IAC 3-1-10.
30. The pleading requirements of T.R.8 are more stringent than AOPA's pleading requirements. Subjecting a petition for administrative review to scrutiny under T.R. 12 would be adding requirements to a petition for review that are not required by AOPA.
31. T.R. 12 is therefore found to be inconsistent with AOPA. The Administrative Law Judge declines to apply T.R. 12 to this proceeding.
32. Pioneer's motion for judgment on the pleadings is denied.

Department's Motion to Dismiss Appeal as Moot:

33. The Department argues that GCC's main objection to the permits is that the activity proposed by Pioneer in its application would constitute illegal waste, which is prohibited

by I.C. § 14-37-11-1 because "'Pioneer intends to drill the coal bed methane wells and flair the methane to qualify for credits that can be received for capturing coal mine methane.'" See Motion to Dismiss, p. 1.

34. The Department argues that effective January 1, 2023, the Indiana legislature amended Indiana's definition of "waste" so that the term specifically does not include capturing and destroying coal bed methane for a commercial purpose, including generating carbon credits. Id. at p. 2. The Department argues that this change means Pioneer's activity would not constitute waste; therefore, the issues GCC raises in its Petition are moot.
35. The Department does not raise the argument that GCC's Petition does not meet the pleading requirements of AOPA or that GCC is not entitled to relief under AOPA or the administrative rules.
36. Rather, the Department argues that a legal basis stated by GCC's in its request for administrative review is not sufficient. Thus, the Department's Motion is a Motion to Dismiss under T.R. 12(b).
37. A 12(b) motion, like a 12(c) motion, is a mechanism for challenging the legal sufficiency of complaint. *Sims*, 757 N.E.2d at 1024 (Ind. Ct. App. 2001).[1]
38. Although T.R. 8 requires the complaint for relief to include a statement of the legal basis entitling the petitioner to relief, no such requirement exists in AOPA.
39. Under AOPA, GCC was not required to include a statement showing why it is entitled to relief. Rather, GCC was required only to request an administrative hearing in writing that includes the requirement so I.C. 4-21.5-3-7.
40. GCC's petition cannot be dismissed based on a legal argument raised in the Petition that is not required by AOPA to be included in the Petition.
41. The Department's Motion to Dismiss is therefore denied.

[1] A T.R. 12(b) motion to dismiss may be made before a party has filed an answer whereas a T.R. 12(c) motion for judgement on the pleadings is made after the pleadings are closed. *See, e.g., Northern Indiana Gun & Outdoor Shows, Inc., v. City of South Bend,* 163 F.3d 449, 456 (1996).

GCC's Motion for Summary Judgment:

Summary judgment standard:

42. A party may move for summary judgment at any time after a proceeding is assigned to the administrative law judge. I.C. § 4-21.5-3-23.
43. Except with respect to service of process, governed by I.C. § 4-21.5-3-1, and the final disposition of an administrative proceeding, governed by I.C. § 4-21.5-3- 28 and 29, Trial Rule 56 of the Indiana Rules of Trial Procedure controls the consideration of a motion for summary judgment. I.C. § 4-21.5-3-23.
44. The ALJ will consider a summary judgment "as would a court that is considering a motion for summary judgment filed under Trial Rule 56 of the Indiana Rules of Trial Procedure." I.C. § 4-21.5-3-23. Summary judgment shall be granted "if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Ind. Trial rule 56(c); *Frendeway & Bartuska v. Brase*, 15 CADDNAR 121, 122 (2020).
45. The party moving for summary judgment bears the burden of establishing the party is entitled to summary judgment regardless of whether the party would have the burden of proof in an evidentiary hearing. *Mueller-Brown v. Caracci*, 13 CADDNAR 156, 157 (2013).
46. The burden of establishing there are no material factual issues is on the party moving for summary judgment. *Morris v. Crain*, 969 N.E.2d 119, 123 (Ind. Ct. App. 2012). Once the movant has met this burden, the opposing party must present sufficient evidence to show the existence of a genuine triable issue. Id.
47. "A party opposing the motion shall designate . . . each material issue of fact which that party asserts precludes entry of summary judgment and the evidence relevant thereto." Ind. Trial Rule 56(C).
48. Summary judgment shall be granted "if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Id.
49. Affidavits supporting or opposing a motion for summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall

show affirmatively that the affiant is competent to testify to the matters stated therein." Trial Rule 56(E).

50. Summary judgment may be granted in favor of the moving or nonmoving party. *C & C Oil Co., Inc. v. Ind. Dept. of Revenue,* 570 N.E.2d 1376 (Ind. Ct. App. 1991). "When any party has moved for summary judgment, the court may grant summary judgment for any other party upon the issues raised by the motion although no motion for summary judgment is filed by such party." T.R. 56(B).

Undisputed Material Facts:

51. GCC owns and operates the Gibson County Coal mine (Gibson North Mine) in Gibson County, IN. See, Petition; Pioneer Answer.
52. On June 1, 1997, the Department issued Underground Coal Mining Permit U-022 to GCC. The permit was most recently renewed on October 11, 2022 and expires on October 26, 2027. Id.
53. Under permit U-022, GCC is authorized to conduct coal mining operations in the Gibson North Mine. Id.
54. GCC maintains that the Gibson North Mine is temporarily sealed, and mining activities could be conducted in the future from the Gibson North Mine. Complaint; Exhibit A of Henderson Affidavit. Pioneer asserts the mine is permanently closed and designated as abandoned. Pioneer's Answer; Affidavit of John Brooke (Brooke Affidavit).
55. John Henderson, Vice President of Land Management for GCC, explained that the Gibson North Mine as an active mine but that it is classified as abandoned by the U.S. Mine Safety Administration and listed as an active mine under Permit U-022 "due to coal processing operations being conducted" at the Mine. See, Henderson Affidavit.
56. Clay Dayson, Reclamation Specialist for the Department, testified that mining operations ceased in 2019 "following removal of continuous mining machines and other underground mining equipment, temporary seals were installed by [GCC] . . . to prevent humans and wildlife from entering the underground mine workings." Affidavit of Clay Dayson.
57. Dayson explained Permit U-022 is listed as active because coal mined by GCC from a separate mine is being separated and processed at the Gibson North Mine. Id.

58. It is not disputed that the Gibson North mine is temporarily sealed. The implications of the sealing for the mine, however, remains disputed.
59. Under Nonsignificant Revision #14 to permit U-022, GCC was granted approval from the Department to dispose of fine refuse from GCC's active Gibson South Mine into the Gibson North Mine. See Complaint; Pioneer Answer.
60. In July 2022, Pioneer filed six applications for Coal Bed Methane permits. Three of the applications involved Pioneer's Hendenreich Farms Inc. Lease and three of the applications involved its Marvel Lease. See Affidavit of Brandi Stennett (Stennett Affidavit) and exhibits.
61. All six permits would allow Pioneer to produce from an area of the Gibson North Coal Mine workings covered by Permit U-22. Id.
62. Pioneer applied for the permits to:

> Drill and complete the well as set forth in the application into the mine void and test the gas quantity and quality. The results of that testing will help inform our decisions regarding use, marketing and/or flaring of the gas encountered and prevent waste. The gas volumes and composition will help determine whether it can be sold into the pipeline, blended with our other gas to achieve pipeline quality, used in our operations, used to generate electricity, or flared. In any of these uses the mineral interest owner will be paid for the extracted gas and it is expected that monetizable credits will be earned.

Stennett Affidavit and attached exhibits.

63. The Department granted the permits under permit numbers 56148, 56149, 56150, 56157, 56158, and 56159. See Totality of the record.
64. On GCC's request, the Department "conducted an informal hearing concerning the proposed wells to be drilled under permit numbers 56148, 56149, 46150, 56157, 56158 and 56159" on October 27, 2022. See Petition.
65. The Department concluded that the issues raised by GCC did not apply to the Department's permitting process. The Department issued the following "Legal Conclusion and Order:"

> Accordingly, the Division determines that the objections and comments filed in this matter are outside the purview of the Division's permitting process to act upon or consider. The permit applications contain the items enumerated by statute and rules of the Division such that the 6 proposed permits should be issued to Pioneer Oil Company, Inc. as requested.

Henderson Affidavit, Exhibit D.

Legal Conclusions:

66. GCC argues the permits should not have been granted because Pioneer has not satisfied all the requirements of Ind. Code § 14-37 for the issuance of the permits.
67. GCC argues:
    a. Pioneer intends to flare gas at the well; however, Pioneer may not do so because only an "owner or operator" of the mine may burn the natural gas in flares. Pioneer is not an owner or operator and may not therefore flare the mines.
    b. Pioneers' coal bed methane (CBM) mining under the permit will constitute illegal waste in violation of I.C. § 14-37.
    c. I.C. § 14-37 prohibits Pioneer from drilling a CBM well into GCC's mine workings for the purpose of flaring methane.
    d. The Department may not issue two well permits in the same space because there are minimum spacing requirements that vary depending on the rules for the particular formation.
68. Pioneer argues that it complied with all the statutory and regulatory requirements; therefore, the Department was required to issue the permits. Summary judgment should therefore be granted in Pioneer's favor.
69. The Department argues the permits were properly granted because Pioneer's application complied with the requirements of I.C. § 14-37-4-8 and 312 IAC 29-4-7.
70. Administrative review of the Department's licensure determination is conducted de novo. I.C. § 4-21.5-3-14.
71. Coal Bed Methane (CBM) is defined as:

> Gaseous substances of whatever character lying within or emanating from:
>
> (1) unmined coal seams, either naturally or as a result of stimulation of the coal seam;
> (2) the void created by mining out coal seams; or
> (3) the gob created by longwall or other extraction methods of coal mining.

I.C. § 14-37-2-42.2.

72. The commission has been granted the authority under to I.C. § 14-37-3-14.5 to regulate CBM wells and compliance with I.C. 14-37-4-8 and I.C. § 14-37-4-8.5.

73. "A person may not drill, deepen, operate or convert a well for oil and gas purposes without a permit issued by the department." I.C. § 14-37-4-1.

74. A well for oil and gas purposes is

> a well bore drilled, deepened, or converted for any purpose for which a permit is required under IC 14-37. The term includes the following: . . . a coal bed methane well.

I.C. 14-8-2-317.

75. Pursuant to I.C. § 14-37-4-5, an application for a permit under I.C. § 14-37 must include:

(1) A plat of the land or lease upon which the well is to be located;
(2) The location of the proposed well as certified by a professional surveyor registered under IC 25-21.5.
(3) The surface elevation of the proposed well and the method used for determining that elevation.
(4) The depth of the proposed well.
(5) The number and location of all other dry, abandoned, or producing wells located with one-fourth (1/4) mile of the proposed well.
(6) The distance from the proposed well to the three (3) nearest boundary lines of the tract.
(7) With respect to an application to drill within a city or town, a certified copy of the official consent by ordinance of the municipal legislative body.
(8) Other information determined by the commission that is necessary to administer this article.

76. I.C. § 14-37-4-8 provides:

> (a) Except as provided in section 9 of this chapter and subject to subsection (b) and (c), if an applicant for a permit complies with:
> (1) this article; and
> (2) the rules adopted under this article;
> the director shall issue the permit.
> (b) The division shall:
> (1) maintain a list of parties with experience and interest in mining commercially minable coal resources who request in writing to be given notice of the filing of completed permit applications under this chapter with respect to coal bed methane; and
> (2) give written notice of each complete permit application filed under this chapter with respect to coal bed methane not later than fifteen (15) days after the filing date to each party on the list maintained under subdivision (1) , and to each party that files an affidavit under IC 14-37-7-8.

(c) The notice given under subsection (b)(2) must include at least the following with respect to each proposed coal bed methane well:
  (1) The location, type, and depth.
  (2) The coal seam affected.

(d) The director may not issue a permit under this chapter until all of the following requirements are satisfied:
  (1) At least thirty (30) days have elapsed after giving notice under subsection (b)(2).
  (2) Proof of both of the following has been submitted to the director:
    (A) Receipt of the permit application's written notice as provided under section 8.5(e) of this chapter.
    (B) That the applicant complied with the notification to the surface owner provisions required under IC 32-23-7-6.5. The applicant may submit as proof a certified mail receipt, the surface owner's written acknowledgment of receipt of the notification or copy of an agreement with the surface owner establishing different notification terms.
  (3) The director has taken into consideration:
    (A) Comments received during the period referred to in subdivision (1) from a person interested in the future minability of the commercially minable coal resource; and
    (B) Objections made under section 8.5(h) of this chapter.
  (4) The applicant has submitted to the director documentation demonstrating that the commercial minable coal seam outside the coal bed methane production area is protected adequately for future underground mining.

(e) Unless waived by the applicant, the director shall issue or deny a permit under this chapter within fifteen (15) days after the elapse of the thirty (30) day notice period under subsection (d)(1).

77. The Commission has promulgated rules under Ind. Code 4-22 to assist in the implementation of the Oil and Gas statute. Regarding permits, 312 IAC 29-3-7 provides:

(a) Except as provided in subsection (b), if an applicant for a permit complies with IC 14-37 and this article, the division shall issue a permit.

(b) The division may deny a permit application if the applicant or if a person owning or controlling the applicant:
  (1) has been issued a notice of violation and failed to abate the violation within sixty (60) days after the deadline for abatement, unless the person has requested an administrative adjudication of the notice of violation, and a final determination has not been rendered by the commission;
  (2) controls or has controlled any well for oil and gas purposes and has demonstrated a pattern of violations of IC 14-37 or this article that have resulted in damage to the environment; or

(3) has had a permit revoked under IC 14-37.

(c) For a permit application that does not meet the requirements of IC 14-37 and this article the division will issue a notice of incomplete application allowing the applicant thirty (30) days to correct the .deficiencies. Failure to correct the deficiencies will result in the division's denial of the application.

(d) The division shall issue notice of its decision to approve or deny a permit application in accordance with 312 IAC 29-3-5.

(e) The decision to approve or deny a permit application for a well for oil and gas purposes is subject to IC 4-21.5.

78. "I.C. 14-37-4-8 expressly requires the Department to issue an oil and gas permit upon compliance with statutory and administrative rule requirements and I.C. 14-27-4-9 specifically identifies the only means by which the Department may refuse to issue a permit if other requirements have been met." *F.D. McCrary Operator, Inc. v. DNR*, 10 CADDNAR 73, 96 (2005).

79. GCC does not argue that the requirements of I.C. § 14-27-4-8 have not been met or that the Department should have refused to issue the permits pursuant to I.C. § 14-27-4-9. Rather, GCC argues that Pioneer is violating I.C. § 14-37-11-2 and 3 because Pioneer intends to flare the coal bed methane. According the GCC, because Pioneer is not an "owner or operator" of the wells at issue, Pioneer is not allowed to flare the CBM.

79. I.C. § 14-37-11-2, provides:

> An owner or operator of a well producing both oil and natural gas may burn the natural gas in flares if there is not a market for the natural gas.

80. I.C. § 14-37-11-3 allows an owner or operator of a coal mine to burn in flares the CBM produced from a CBM well if the burning is necessary to protect coal miners' safety and/or it is not economical to market the CBM.

81. The term "owner" and "operator" are separately defined under Indiana Code. For the purpose of I.C. 14-37, an owner is defined as a "person who has a right to drill into and produce from a pool and to appropriate the oil and gas produced from the pool for the person and/or others." I.C. § 14-8-2-195.

82. The term "operator" refers to a person to whom a permit has been issued or a person engaging in an activity for which a permit is required. I.C. § 14-8-2-190; 312 IAC 29-2-94.

83. Pioneer is clearly a person to whom a permit is issued. Thus, Pioneer may flare CBM if the other conditions of I.C. § 14-37-11-2 and § 14-37-11-3 are met.

84. "[T]he mere fact than an operator may potentially act in contravention of the term of a permit is not, in and of itself, a legitimate basis for denying the permit in the first place." *Hoosier Energy Rural Electric v. DNR and L.C. Neely Drilling*, 13 CADDANR 1, 3 (2012).

85. I.C. § 14-37-12 grants the Department enforcement authority against a person who violates I.C. 14-37 or any administrative rule adopted pursuant to I.C. 14-37. I.C. § 14-27-12-2. The Department's enforcement authority includes the ability to revoke a permit. If, in the future, Pioneer violates the provisions of I.C. § 14-37 or any rule applicable thereto, Pioneer would be subject to the Department's enforcement authority, including the possibility of its permits being revoked.

86. GCC also argues that Pioneer's proposed wells would constitute waste which is prohibited under § I.C. 14-37-11-1, which provides: "Except as provided in this chapter, waste is prohibited."

87. Waste is defined in I.C. § 14-8-2-302 as:

> (2) For the purposes of IC 14-37, the term includes the following:
>
> (A) Locating, spacing, drilling, equipping, operating, or producing a well for oil and gas purposes drilled after March13, 1947, in any manner that:
> (i) Reduces or tends to reduce the quantity of oil or gas ultimately to be recovered from any well in Indiana; or
> (ii) Violates the spacing provision adopted by the commission under IC 14-37.
>
> (B) Storing oil in earthen reservoirs except in an emergency to prevent total loss of that oi.
>
> (C) Producing oil or gas in a manner that will cause water channeling or zoning.
>
> (D) Injecting fluids into a stratum or party of a stratum capable of producing oil or gas, except in accordance with the terms of a Class II well for which a permit issued under IC 14-37.
>
> (E) Allowing water other than fresh water to flow from any producing horizon located in a producing pool, except in accordance with the term of a permit issued under IC 14-37.
>
> (3) For purposes of IC 14-37, the term does not include capturing and destroying coal bed methane for a commercial purpose, including the generation of carbon credits.

88. Pioneer indicated in its permit applications that it might flair the CBM to generate carbon credits.

89. GCC argues that despite the amendment, CMB flaring operations "not carried out in conjunction with or incident to ownership or operation of an existing well or mine- regardless of whether it is carried out for the purpose of generating carbon offset credits – is still considered waste within the meaning of § 14-37-11-1." According to GCC's argument, only GCC, as the "owner or operator" of the Gibson North Mine, could carry out CBM flaring without causing illegal waste. See Petitioner's Motion for Summary Judgment.

90. GCC's argument equates the phrase "owner or operator" with "owner." As stated above, the terms are defined separately. The term "operator" includes a person to whom a permit has been issued, which would include Pioneer. I.C. § 14-8-2-190; 312 IAC 29-2-94.

91. GCC argues that Pioneer is prohibited from drilling a CBM well into GCC's mine workings to conduct CBM flaring. GCC again asserts that only GCC, as the owner or operator of the Gibson North Mine, may conduct flaring activity at the Gibson North Mine.

92. As has already been established, Pioneer is an operator and may conduct flaring activity. GCC has cited no law that prohibits the Department from granting Pioneer's permits even though they involve the mine workings of the Gibson North Mine.

93. GCC further argues that that the Department "may not issue two well permits in the same space; there are minimum spacing requirements that vary depending on the rules for the particular formation." See Petitioner's Motion for Summary Judgment, p. 9.

94. GCC did not support this argument with citation to authority or evidentiary materials but argues Pioneer's activities could violate spacing requirements which could cause problems, including increased risk for the potential for accidents.

95. Pioneer would be subject to appropriate sanctions and penalties if it violated the terms of the permit or regulatory requirements. However, the potential that a violation would occur after the permit is granted is not a "legitimate basis for denying the permit in the first place." *Hoosier Energy Rural Electric v*13 CADDNAR 1, 3.

96. That spacing requirements could be violated sometime in the future is not a legitimate basis for denying Pioneer's permits.

97. The burden was on GCC to establish it is entitled to judgment as a matter of law. GCC has failed in this regard.

98. Further, the facts relevant to the Department's issuance of the permits is not in dispute. Summary judgment is therefore granted in favor of the Department and Pioneer.

Non-Final Order:

99. Summary judgment is granted in favor of Pioneer Oil Company, Inc., and the Department of Natural Resources.

100. This non-final order disposes of all issues in this proceeding.

101. The administrative hearing scheduled for December 6 and December 7, 2023, is hereby vacated.

Dated: October 20, 2023

_____

Elizabeth Gamboa, Chief Administrative Law Judge
Natural Resources Commission
Indiana Government Center North
100 North Senate Avenue, Room N103
Indianapolis, Indiana 46204-2200
(317) 232-4699

DISTRIBUTION

The foregoing is distributed to the parties as follows on October 20, 2023.

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A copy of the foregoing will also be distributed to the following in accordance with IC 4-21.5-3 or IC 5-14-3. *The parties need not serve pleadings, motions, or other filings upon these persons.*

Jim AmRhein, DNR Division of Oil and Gas

By: Scott Allen, Legal Analyst, Natural Resources Commission

Allen, Scott

From: NRCAOPA
Sent: Friday, October 20, 2023 3:03 PM
To: 'Joe.langerak@skofirm.com'; 'Katie.boren@skofirm.com'; 'Slink@pioneeroil.net'; Boyko, Ihor; DNR Legal
Cc: AmRhein, James
Subject: Gibson Co. Coal LLC v. DNR et al (22-069G) SJ order
Attachments: Gibson Co. Coal LLC v. DNR et al (22-069G) SJorder.pdf; Gibson Co. Coal LLC v. DNR et al (22-069G) NFONotice.pdf

Follow Up Flag: Follow up
Flag Status: Completed

The Document(s) attached have been entered into the record for the referenced proceeding.

Thank you,

Natural Resources Commission – Division of Hearings Indiana Government Center North
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SA

BEFORE THE
NATURAL RESOURCES COMMISSION
OF THE STATE OF INDIANA

IN THE MATTER OF:

GIBSON COUNTY COAL, LLC,	)	
Petitioner,	)	**Administrative Cause No. 22-069G**
	)	
vs.	)	
	)	
DEPARTMENT OF NATURAL RESOURCES	)	**Division of Oil and Gas Permits**
And PIONEER OIL COMPANY, INC.,	)	**56148, 56149, 56150, 56157, 56158**
Respondents	)	**and 56159**

PETITIONER'S OBJECTION TO ORDER

Petitioner Gibson County Coal, LLC ("Petitioner" or "GCC") submits this objection to the Order Denying Gibson County Coal's Motion for Summary Judgment and Granting Summary Judgment in Favor of the Department of Natural Resources and Pioneer Oil Company, Inc. with Findings of Fact, Conclusions of Law, and Nonfinal Order (the "Order") issued by the on October 20, 2023.

Grounds for Objection

Pursuant to Indiana Code § 4-21.5-3-29 and 312 IAC 3-1-12, GCC objects to the Order on the following grounds:

1. Pursuant to Ind. Code § 14-37-4-8 and 312 I.A.C. 29-4-7, the director "shall" issue a permit when an applicant complies with Ind. Code art. 14-37 and rules adopted thereunder. Thus, an applicant who does not demonstrate compliance with *all* provisions of Ind. Code article 14-37 is *not* entitled to a permit. Here, Pioneer Oil Company, Inc. ("Pioneer") is not entitled to the Permits because its CBM flaring operations are noncompliant with Ind. Code ch. 14-37-11.

2. The Order misinterpreted Ind. Code §§ 14-37-11-2 and -3 in concluding that Pioneer need only be an "operator" as defined in I.C. § 14-8-2-195 to flare CBM.

3. An "operator" is defined in relevant part as a person who "is issued a permit under IC 14-37" or who "is engaging in an activity for which a permit is required under IC 14-37." Ind. Code § 14-8-2-190(6).

4. The Order concludes Pioneer is an "operator" because it has been issued the Permits, which themselves confer "operator" status and authority to flare CBM.

5. As a threshold matter, the Order reasoning is circular. The Order does not disagree with GCC's argument Ind. Code § 14-37-4-8 and 312 I.A.C. 29-4-7 require compliance with the entirety of Ind. Code art. 14-37 as a prerequisite to issuance of a permit. And yet, the Order concludes Pioneer is compliant with Ind. Code §§ 14-37-11-2 and -3 *because* the Permits have been issued, making Pioneer an "operator." In other words, Pioneer is eligible for the Permits because the Permits have been issued.

6. Circularity aside, the conclusion in this regard overlooks the plain statutory language of Ind. Code §§ 14-37-11-2 and -3, which places limitations on the classes of owners and operators who are permitted to flare CBM.

a. Specifically, I.C. § 14-37-11-2 provides that the owner or operator of "a well producing **both oil and natural gas**" may flare CBM.

b. I.C. § 14-37-11-3 provides that an owner or operator "of a **coal mine**" may flare CBM.

7. Pioneer has been issued Permits to produce CBM. Even if the Permits might make Pioneer an "operator" as defined by Ind. Code § 14-8-2-190(6), they do not make Pioneer an operator of a coal mine or a well producing both oil and natural gas. Because Pioneer's wells

will produce only CBM, Pioneer does not fall within either of the classes of operators authorized to flare CBM under Ind. Code §§ 14-37-11-2 and -3.

8. To conclude that status as an "owner" or "operator" in itself confers authority to flare CBM would render the foregoing language of Ind. Code §§ 14-37-11-2 and -3 meaningless and superfluous.

9. For the same reasons, the Order errs in concluding that Pioneer's alleged status as an "operator" within the meaning of Ind. Code § 14-8-2-190(6) means that Pioneer's flaring operations cannot constitute waste within the meaning of Ind. Code §§ 14-37-11-1. It is not enough that Pioneer might be an "operator." To benefit from the exceptions Ind. Code § 14-37-11-1 set forth Ind. Code §§ 14-37-11-2 and -3, Pioneer must be an operator of either a coal mine or a well producing both oil and natural gas. It is not. Rather, Pioneer is the operator—or seeks to become the operator—of a well producing only gas. The statutory scheme does not permit flaring gas from a well that produces only gas. The classification of such an operation as waste reflects the considered legislative judgment that the actual and potential environmental harms associated with gas flaring are justified only when balanced by the benefits associated an already-existing oil well or coal mine.

10. GCC's argument in this regard does not equate the phrase "owner or operator" with "owner." *See* Order at ¶ 90. GCC's argument does not turn on whether Pioneer can be classified as an "owner" or "operator" alone. Rather, the argument turns on *what* Pioneer purports to own or operate—i.e., whether Pioneer owns or operates a coal mine or a well producing both oil and natural gas.

11. Because Pioneer is not an owner or an operator of a coal mine or a well producing both oil and natural gas, it is not authorized to flare CBM under Ind. Code §§ 14-37-11-2 or -3.

Because its proposed CBM flaring operation (which is now active) does not comply with Ind. Code §§ 14-37-11-2 or -3, Pioneer was not and is not eligible for the Permits, and they must be revoked.

Conclusion

For the foregoing reasons, the Order should be modified to grant summary judgment in GCC's favor and revoke the Permits.

Respectfully submitted,

STOLL KEENON OGDEN PLLC

/s/Joseph H. Langerak

/s/L. Katherine Boren

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CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2023, the foregoing document filed with the Natural Resources Commission via email at the following address: nrcaopa@nrc.IN.gov. The foregoing was contemporaneously served via email upon Respondents at the following addresses:

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/s/ L. Katherine Boren
L. Katherine Boren

From:	Katie Boren
To:	NRCAOPA
Cc:	slink@pioneeroil.net; Boyko, Ihor; Joseph H. Langerak; Brenda Glenn
Subject:	Gibson Co. Coal LLC v. DNR (22-069G): Petitioner"s Objection to ALJ Order
Date:	Monday, November 6, 2023 12:30:06 PM
Attachments:	image797101.png Petitioner"s Objection to ALJ Decision.pdf

Attached please find Petitioner Gibson County Coal, LLC's objection to the summary judgment order issued on October 20, 2023.

Thank you.

Katie Boren (She/Her/Hers)
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BEFORE THE
NATURAL RESOURCES COMMISSION
OF THE STATE OF INDIANA

IN THE MATTER OF:

GIBSON COUNTY COAL, LLC,	)	
Petitioner,	)	**Administrative Cause No. 22-069G**
	)	
vs.	)	
	)	
DEPARTMENT OF NATURAL RESOURCES	)	**Division of Oil and Gas Permits**
And PIONEER OIL COMPANY, INC.,	)	**56148, 56149, 56150, 56157, 56158**
Respondents	)	**and 56159**

RESPONDENT PIONEER OIL COMPANY, INC.'S RESPONSE TO PETITIONER'S OBJECTION TO ORDER

Comes now the Respondent Pioneer Oil Company, Inc. ("Pioneer") and submits this Response to the Objection of Petitioner Gibson County Coal, LLC ("GCC") to the Order of the Administrative Law Judge ("ALJ") entered on October 20, 2023.

ARGUMENT

1. The objection is nothing more than a regurgitation of failed arguments advanced by GCC before both the agency at the informal hearing and the ALJ in this administrative cause. This is GCC's third swing, and it, too, is a miss.
2. Conspicuously absent from GCC's objection is any mention of the controlling statute which defines "waste", I.C. 14-8-2-302. There is no ambiguity: "waste" "…**does not** include capturing and destroying coal bed methane for a commercial purpose, including generation of carbon credits." (Emphasis added.)
3. The ALJ (and the agency before her) correctly concluded that speculation about what a potential permittee might or might not do in operating the wells following issuance

of the drilling permits is not material to the decision to issue the permits in the first place. Rather, that activity, were it to occur, would raise an enforcement issue, not a permitting issue. In reaching this conclusion, the ALJ followed both clear statutory mandate (I.C. 14-37-4-8) and controlling agency precedent (*Hoosier Energy Rural Electric. v. DNR and L.C. Neely Drilling*, 13 CADDNAR 1 {2012}).

4. The ALJ further correctly concluded that even if it were proper to consider potential post-permitting flaring for carbon credits in connection with the permitting process, such activity would not be statutorily prohibited "waste". Again, that conclusion is supported, indeed required, by the plain meaning of the recent legislative amendment of the "waste" definition (I.C. 14-8-2-302).

CONCLUSION

The objection should be overruled, and the Order affirmed as the Commission's final agency action on the matter.

/S/ Stephen T. Link
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CERTIFICATE OF SERVICE

I certify that on November 30, 2023, a copy of the foregoing document was served by electronic mail on the following:

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L. Katherine Boren: Katie.boren@skofirm.com
Ihor N. Boyko: iboyko@dnr.in.gov

/S/ Stephen T. Link
Stephen T. Link
Attorney for Respondent Pioneer Oil Company, Inc.

From: Steve Link
To: NRCAOPA
Cc: Langerak, Joe; Boren, Katie; Boyko, Ihor; Wes Brooke
Subject: Gibson County Coal, LLC v. DNR and Pioneer Oil Company, Inc.; Cause No. 22-069G
Date: Thursday, November 30, 2023 2:47:27 PM
Attachments: Pioneer Response to Objections to OrderAdmin Proc.pdf

Attached please find Respondent Pioneer Oil Company, Inc.'s Response to Petitioner's objection to the Chief Administrative Law Judge's October 20, 2023 order.

Stephen T. Link
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EFORE THE
NATURAL RESOURCES COMMISSION
OF THE
STATE OF INDIANA

IN THE MATTER OF:

GIBSON COUNTY COAL, LLC,	)	**Administrative Cause**
Petitioner,	)	**Number: 22-069G**
	)	
vs.	)	
	)	[Permit Nos. **56148, 56149, 56150**
DEPARTMENT OF NATURAL RESOURCES	)	**56157, 56158 and 56159]**
and PIONEER OIL COMPANY, INC.,	)	
Respondents.	)	

RESPONDENT DNR'S RESPONSE TO PETITIONER'S OBJECTIONS TO ORDER

Respondent Indiana Department of Natural Resources ("DNR"), by counsel, submits its response to Petitioner's Objections to Order ("Objections") filed on November 6, 2023.[1]

Response to Objections

Petitioner objects to the nonfinal order in this case on the grounds that an applicant for a permit must demonstrate compliance with *all* provisions of Ind. Code 14-37 in order to be entitled to issuance of a permit by Respondent DNR and that Respondent Pioneer Oil Company, Inc. ("Pioneer") is not entitled to permits because its Coal Bed Methane (CBM) flaring operations do not comply with Ind. Code 14-37-11.

As Respondent Pioneer points out in its response filed on November 30, 2023, to the same Objections:

> 2. Conspicuously absent from GCC's objection is any mention of the controlling statute which defines "waste", I.C. 14-8-2-302. There is no ambiguity: "waste" "…**does not** include capturing and destroying coal bed methane for a commercial purpose, including generation of carbon credits." (Emphasis added.)

[1] Petitioners filed objections to the Administrative Law Judge's "Order Denying Gibson County Coal's Motion for Summary Judgment and Granting Summary Judgment in Favor of the Department of Natural Resources and Pioneer Oil Company, Inc. with Findings of Fact, Conclusions of Law, and Nonfinal Order" issued on October 20, 2023.

Respondent DNR previously argued and pointed out that I.C. 14-37-11 prohibits waste and does not contain any specific requirements that can be interpreted to apply to permit issuance. The plain language of I.C. 14-37-11-1 explicitly states "[e]xcept as provided in this chapter, waste is prohibited." The language of the recent amendment to the definition of "waste" in I.C. 14-8-2-302(3)[2] cited above reads more completely as follows:

> **For purposes of IC 14-37** (emphasis added), the term does not include capturing and destroying coal bed methane for a commercial purpose, including the generation of carbon credits.

By its plain language, the above definition must be incorporated whenever reading I.C. 14-37-11-1 since it is part of I.C. 14-37 and the defined term "waste" appears.

Permit issuance is governed by I.C. 14-37-4-8 and 312 IAC 29-4-7 stating in I.C. 14-37-4-8(a) and 312 IAC 29-4-7(a) that a drilling permit "shall issue" when the permit application complies with the corresponding statute and rule. No wording from I.C. 14-37-11 is specifically incorporated into these permit issuance requirements and the only logical conclusion is that I.C. 14-37-11 does not apply to permit issuance.

In addition, a permit is required before one is allowed to legally operate a well for oil and gas purposes or engage in coal mining.[3] The plain language of I.C. 14-37-11 prohibits waste, prescribes penalties for committing waste, and applies to an owner or operator. The definition of "operator" for purposes of I.C. 14-37 in I.C. 14-8-2-190(6)(A) includes a person who "is issued a permit under I.C. 14-37". The definition of "operator" for purposes of I.C. 14-37 in I.C. 14-8-2-190(6)(B) also includes a person who "is engaging in an activity for which a permit is required under I.C. 14-37". This definition alone fails to support Petitioner's argument that I.C. 14-37-11 is a permit requirement due to its application to those who may not even hold a permit in the first

[2] Added by P.L.83-2023, SEC.8, with an effective date retroactive to January 1, 2023.
[3] See I.C. 14-37-4-1, 312 IAC 29-4-1, I.C. 14-34-3, and 312 IAC 25-4-58.

place. A statute is to be interpreted "consistent with its plain meaning, by giving effect to what the legislature both said and did not say." *Estabrook v. Mazak Corporation*, 140 N.E.3d 830, 834 (Ind. 2020).

Based on the foregoing, Petitioner's Objections should be rejected and the nonfinal order issued by the Administrative Law Judge on October 20, 2023, should be affirmed.

Respectfully submitted,

Ihor N. Boyko, No. 2886-49
Attorney for Respondent DNR

CERTIFICATE OF SERVICE

I certify that on December 22, 2023, a copy of this response was served by electronic mail on the following counsel of record:

Joseph H. Langerek: Joe.langerek@skofirm.com

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To: NRCAOPA
Cc: Langerak, Joe; Boren, Katie; Steve Link
Subject: Respondent DNR's Response to Petitioner's Objections to Order: Administrative Cause No. 22-069G
Attachments: 20231222153604286.pdf

Please file the attached Respondent DNR's Response to Petitioner's Objections to Order in Administrative Cause No. 22-069G.

-----Original Message-----
From: scanner@in.gov <scanner@in.gov>
Sent: Friday, December 22, 2023 3:36 PM
To: Boyko, Ihor <IBoyko@dnr.IN.gov>
Subject: Message from "RNP583879122961"

This E-mail was sent from "RNP583879122961" (MP C4504ex).

Scan Date: 12.22.2023 15:36:04 (-0500)
Queries to: scanner@in.gov

BEFORE THE
NATURAL RESOURCES COMMISSION
OF THE STATE OF INDIANA

IN THE MATTER OF:

GIBSON COUNTY COAL, LLC,	**)**	
Petitioner,	**)**	**Administrative Cause No. 22-069G**
	)	
vs.	**)**	
	)	
DEPARTMENT OF NATURAL RESOURCES	**)**	**Division of Oil and Gas Permits**
And PIONEER OIL COMPANY, INC.,	**)**	**56148, 56149, 56150, 56157, 56158**
Respondents	**)**	**and 56159**

PETITIONER'S MOTION FOR SUMMARY JUDGMENT

Petitioner Gibson County Coal, LLC ("Petitioner" or "GCC") moves for summary judgment on its Petition for Administrative Review ("Petition") filed herein.

Background

GCC is the owner and operator of a coal mine located in Gibson County, Indiana (the "Gibson North Mine). The Gibson North Mine is subject to Underground Coal Mining Permit U-022, originally issued by the Indiana Department of Natural Resources, Division of Oil and Gas (the "DNR") on June 1, 1997 to GCC. *See* Affidavit of John H. Henderson (the "Affidavit"), a true and accurate copy of which is attached hereto as **Exhibit 1**. The permit was most recently renewed in 2022 and expires in 2027. *See* Aff., Ex. C.

The Gibson North Mine is temporarily, not permanently, sealed. *Id.*, Ex. A, Ex. B. Permit U-022 remains an active underground mining permit. *Id*. By placing temporary seals on the mine facilities (e.g., portals, air shafts, etc.) and maintaining Permit U-022 as active, GCC maintains the ability to reenter the Gibson North Mine to conduct additional future mining operations. *Id.*

Under Nonsignificant Revision # 14 to Permit U-022, GCC requested and received approval to dispose of fine refuse in the mined-out portions of the Gibson North Mine. *Id.* Further, GCC also obtained a permit from the United States Environmental Protection Agency ("EPA") to dispose of slurry into the Gibson North Mine. *Id.*, Ex. C. Operation of GCC's coal preparation plant is essential to the continuing efficient operation of GCC's Gibson South Mine. *Id.*, Ex. A, Ex. B.

In 2022, GCC authorized its contractor, ECC Bethany, Inc. ("ECC Bethany"), to permit and install a flare at one of the vent pipes permitted at the Gibson North Mine. *Id.*, Ex. C. The Indiana Department of Environmental Management ("IDEM") approved Permit Number 051-45378-00062 on June 16, 2022, and ECC Bethany began flaring methane from the Gibson North Mine on July 7, 2022. *Id.* At the same time flaring began, the valves on other vent pipes into the Gibson North Mine were closed. *Id.* Accordingly, all methane currently being vented from the Gibson North Mine is being destroyed by the ECC Bethany flare; no methane is being vented into the atmosphere. *Id.*

Pioneer Oil Company, Inc. ("Pioneer" or "Respondent") has filed applications for and been issued permits to drill coal bed methane ("CBM") wells into the mine workings of the Gibson North Mine, the same mine workings that are already subject to GCC Permit U-022 and Nonsignificant Revision #14 to Permit U-022. *See id.*, Ex. A., Ex. B. The subject Pioneer permits are identified by the DNR as permit numbers 56148, 56149, 56150, 56157, 56158, and 56159 (collectively, the "Permits").[1] *See id.*, Ex. C. According to Pioneer's "Application for Listing a

[1] Pioneer filed its applications with the DNR for Permit Nos. 56148, 56149, and 56150 on June 22, 2022, and for Permit Nos. 56157, 56158, and 56159 on July 18, 2022.

Mine Methane Capture Offset Project," Pioneer will employ a flare to combust methane extracted from the Gibson North Mine.[2]

GCC filed written objections to Pioneer's Permit applications with the DNR. *Id.*, Ex. A, Ex. B, Ex. C. On October 27, 2022, an informal hearing was conducted pursuant to 312 IAC 29-3-4 to consider the applications for the Permits. *Id.*, Ex. D. On December 8, 2022, the DNR issued its *Findings of Fact, Legal Conclusions, and Determination of Informal Hearing Under 312 IAC 29-3-4* dated December 7, 2022 (the "Order") to Pioneer and GCC. The Order relies on I.C. § 14-37-4-5; I.C. § 14-37-4-8; and certain administrative rules promulgated thereunder, including 312 IAC 29-4-7, to conclude the Permits should issue to Pioneer as requested. *Id*. Specifically, the Order reasoned that because Pioneer's Permit applications complied with the enumerated requirements of I.C. § 14-37-4-5, the DNR was obligated to issue the Permits to Pioneer pursuant to I.C. § 14-37-4-8 and 312 IAC 29-4-7(a), and, as a result, the comments and objections opposing the Permits' issuance fell outside the purview of the DNR's permitting process to consider or act upon. *See id.*

On December 22, 2022, GCC timely filed its Petition for Administrative Review requesting that issuance of the Permits be revoked along with a hearing before the Natural Resources Commission, Division of Hearings.

Summary Judgment Standard

Parties to an administrative proceeding governed by AOPA "may at any time after a matter is assigned to an administrative law judge, move for a summary judgment in the party's favor as to all or any part of the issues in a proceeding." Ind. Code § 4-21.5-3-23. In considering such a motion, the ALJ must apply the summary judgment standard set forth in Ind. Trial Rule 56. *Id.*

[2] Pioneer's application is available at: American Carbon Registry (apx.com).

Under T.R. 56, summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. T.R. 56(C). "A fact is 'material' if its resolution would affect the outcome of the case, and an issue is 'genuine' if a trier of fact is required to resolve the parties' differing accounts of the truth, or if the undisputed material facts support conflicting reasonable inferences." *Moseley v. Trustees of Larkin Baptist Church*, 155 N.E.3d 1221, 1224 (Ind. Ct. App. 2020) (quoting *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014)). The summary judgment movant bears the initial burden to demonstrate the absence of any genuine issue of material fact as to a determinative issue, at which point the burden shifts to the non-movant to come forward with contrary evidence establishing an issue for the trier of fact. *Id.* In considering a motion for summary judgment, "[a]ny doubt as to any facts or inferences to be drawn therefrom must be resolved in favor of the non-moving party." *Goodwin v. Yeakle's Sports Bar & Grill, Inc.*, 62 N.E.3d 384, 386 (Ind. 2016).

Argument

1. Respondent has not satisfied statutory or regulatory eligibility standards for the Permits.

To be eligible for the Permits, Pioneer must satisfy the conditions set forth in Ind. Code § 14-37-4-8 ("Section 8"). Section 8 provides that "the director shall issue a permit" if "an applicant for a permit complies with . . . **this article**; **and . . . the rules adopted under this article**[.]" (emphasis added). Likewise, 312 I.A.C. 29-4-7 provides that "if an applicant for a permit complies with **IC 14-37 and this article**, the division shall issue a permit." (emphasis added). Thus, contrary to Pioneer's assertions and the Order, it is not enough that Pioneer might have satisfied the notice requirements set forth in Section 8. To be eligible for the Permits, Pioneer must satisfy *all* eligibility requirements and conditions set out in Ind. Code art. 14-37 as well as all regulations adopted under that article. Pioneer has not done so.

Specifically, Pioneer has not satisfied the eligibility requirements set forth in Ind. Code § 14-37-11-2 and -3, both of which place limitations on who may flare gas and the conditions under which they may do so. Under I.C. § 14-37-11-2, "[a]n owner or operator of a well producing both oil and natural gas may burn the natural gas in flares if there is not a market for the natural gas." Pioneer does not own or operate "a well producing both oil and natural gas." Thus, Pioneer does not qualify for the Permits under I.C. § 14-37-11-2.

Alternatively, I.C. § 14-37-11-3 provides as follows:

> The owner or operator of a coal mine may burn in flares the coal bed methane produced from a coal bed methane well if either or both of the following apply:
>
> (1) The burning is necessary to protect coal miners' safety.
>
> (2) It is not economical to market the coal bed methane.

Because Pioneer is not the "owner or operator of a coal mine," it does not qualify for the Permits under I.C. § 14-37-11-3.

The foregoing statutes make it clear that gas flaring is permissible only when done in conjunction with or incident to the ownership or operation of an oil well or coal mine. Pioneer is not the owner or operator of an oil well or coal mine within the locations associated with the Permits, and its activities are unrelated to the ownership or operation of an oil well or coal mine at those locations. Rather, Pioneer seeks to drill a new well into a coal mine it does not own or operate—and over the objection of the mine owner/operator—for the purpose of releasing and flaring CBM. Such conduct is not authorized under Ind. Code 14-37; accordingly, Pioneer is not eligible for the Permits under Section 8 or 312 I.A.C. 29-4-7.

2. Respondent is ineligible for the Permits because its proposed CBM well and associated flare will constitute impermissible waste under Ind. Code § 14-37-11-1.

In addition to the foregoing, Pioneer is ineligible for the Permits because its proposed CBM well will violate another provision of Ind. Code 14-37—namely, Ind. Code § 14-37-11-1, which provides that **"[e]xcept as provided in this chapter**, waste is prohibited." (emphasis supplied). Both I.C. § 14-37-11-2 and -3 are located within the same chapter as I.C. § 14-37-11-1. Thus, the implication is that gas flaring that does not fall within either of the express statutory exceptions set out I.C. § 14-37-11-2 and -3 *does* constitute prohibited waste within the meaning of I.C. § 14-37-11-1. *See Quimby v. Becovic Mgmt. Grp., Inc.*, 962 N.E.2d 1199, 1201 (Ind. 2012) (noting that the location of a statute within the Indiana Code is helpful in determining legislative intent (citing *Roberts v. Sankey*, 813 N.E.2d 1195, 1198 (Ind. Ct. App. 2004), *trans. denied*).

In other words, gas flaring will not constitute waste if it is conducted in conjunction with or incident to the ownership of an oil well or coal mine; however, gas flaring unrelated to the ownership or operation of an existing oil well or coal mine will constitute waste. The classification of such operations as waste reflects the considered legislative judgment that the actual and potential environmental harms associated with conducting flaring operations are justified only when they are associated with the ownership or operation of an already-existing oil well or coal mine.

Both Pioneer and the DNR have cited the newly revised statutory definition of "waste" set out in Ind. Code § 14-8-2-302 in their pending dispositive motions.[3] But that definition does

[3] GCC intends to file separate responses to such motions.

not alter the conclusion that Pioneer's activities will constitute waste.[4] As Pioneer has explained, this definition was recently amended, retroactive to January 1, 2023, to provide that "[f]or purposes of IC 14-37, the term does not include capturing and destroying coal bed methane for a commercial purpose, including the generation of carbon credits." This new definition does not, as Pioneer has claimed, mean that "flaring of CBM for carbon credits does not constitute waste under Indiana law in any event." The new statutory definition of waste does not go so far as to place all CBM flaring activities—regardless of where and by whom and under what circumstances they are conducted—beyond the reach of statutory prohibitions on waste. To conclude otherwise would be inconsistent with the provisions set forth in I.C. ch. 14-37-11 and the language of I.C. § 14-8-2-302 itself. *See Horn v. Hendrickson*, 824 N.E.2d 690, 698 (Ind. Ct. App. 2005) (explaining the "fundamental rule of statutory construction" requiring that statutes which address the same subject matter are *in pari materia* and must, where possible, be construed together to produce a harmonious result).

Contrary to Pioneer's assertions, the amendment to the definition of waste simply clarifies that the generation of carbon offset credits is considered a "commercial purpose" and that CBM capture and destruction is not considered waste solely by virtue of the fact that it is carried out for that purpose. That clarification was necessary in light of the advent of carbon offset credits, which have incentivized the release and capture of CBM solely for the purposes of its destruction by flaring. Of course, production of other natural resources, like coal or oil, for the sole purpose of destruction would typically be viewed as waste. But because carbon offset credits allow owners or operators of wells and mines to derive economic value from the destruction of CBM, the General Assembly saw fit to clarify that capturing CBM for the sole

[4] The amended definition certainly does not render GCC's appeal moot, as suggested by the DNR. GCC's appeal is not premised solely on the contention that Pioneer's proposed activities would constitute waste.

purpose of destroying it to collect available carbon offset credits is not, in and of itself, waste. But that does not mean that CBM flaring for carbon credits can *never* amount to waste under any circumstances. Indeed, I.C. § 14-8-2-302 itself sets out several circumstances in which a CBM flaring operation could amount to waste even where it is carried out for the purpose of collecting carbon offset credits. *See, e.g.* I.C. § 14-8-2-302(2)(A) (waste includes "[l]ocating, spacing, drilling, equipping, operating, or producing a well for oil and gas purposes . . . in any manner that . . . reduces or tends to reduce the quantity of oil or gas ultimately to be recovered from any well in Indiana; or . . . violates the spacing provisions adopted by the commission under IC 14-37"); I.C. § 14-8-2-302(2)(B) (waste includes "[p]roducing oil or gas in a manner that will cause water channeling or zoning").[5]

Further, when the General Assembly adopted the amended definition of waste, it declined to amend I.C. ch. 14-37-11 in any way. By leaving I.C. ch. 14-37-11 in place, unaltered, notwithstanding its amendment of the definition of waste, the General Assembly signaled its continuing intent to permit CBM flaring operations only when such operations are carried out by the owner or operator of an already-existing oil well or coal mine. *See Fox v. Hawkins*, 594 N.E.2d 493, 497 n.5 (Ind. Ct. App. 1992) (in enacting statutes, the legislature is presumed to be aware of other statutes on the same subject). Thus, a CBM flaring operation that is not carried out in conjunction with or incident to ownership or operation of an existing well or mine—regardless of whether it is carried out for the purpose of generating carbon offset credits—is still considered waste within the meaning of I.C. § 14-37-11-1. Such an interpretation is necessary to effectuate legislative intent and to harmonize the amended definition of waste with existing

[5] Ind. Code § 14-37-4-8.5 also identifies circumstances in which a CBM flaring operation could constitute waste—namely, when it "unreasonably reduces or tends to unreasonably reduce the quantity of commercially minable coal resources ultimately to be recovered from a mine."

statutory provisions on the same subject.[6] Because Pioneer's proposed CBM well and flare will amount to waste under I.C. § 14-37-11-1, Pioneer is not entitled to the Permits under Section 8 and 312 I.A.C. 29-4-7.

3. The statutory framework of I.C. 14-37 prohibits Respondent from drilling a CBM well into GCC's mine workings for the purpose of flaring methane.

Finally, the Permits purport to authorize Pioneer to drill into the Gibson North Mine, which is owned and operated by GCC. Throughout the life of this dispute, GCC has argued that Pioneer cannot be authorized to drill a CBM well into GCC's mine workings over GCC's objection. Pioneer has taken the position that nothing in the governing statutes prohibits it from doing so, but that is not an accurate statement of the law. As described above, only the owner or operator of a coal mine or a well producing both oil and gas may burn gas in flares. The import of these statutory limitations is clear—those who are *not* the owner or operator of the coal mine or well may *not* flare CBM produced from the mine or well of another. That is precisely what Pioneer intends to do, and it is impermissible under state law.

This interpretation is not only required by the plain language of I.C. ch. 14-37-11, but it is also consistent with the statutory and regulatory approach to permitting in other contexts. For example, in the oil and gas context, the DNR may not issue two well permits in the same space; there are minimum spacing requirements that vary depending on the rules for the particular formation. The area into which Pioneer intends to drill its CBM well is already subject to a DNR permit (U-022). The potential problems that could arise from allowing two different DNR-

[6] For the sake of clarity, it should be noted that even if the Commission were to conclude that the newly amended statutory definition of waste means that CBM flaring can *never* constitute waste for the purposes of I.C. § 14-37-11-1, I.C. § 14-37-11-2 and -3 nevertheless continue to limit the individuals who may flare gas and the conditions under which they may do so irrespective of whether such conduct amounts to waste. In other words, even if CBM flaring conducted outside the confines of I.C. § 14-37-11-2 and -3 cannot be considered "waste," such CBM flaring is nevertheless prohibited under Section 8 because it is not authorized under I.C. § 14-37-11-2 or -3.

regulated activities to be permitted in the same space are obvious. Each of the permitted activities may be subject to separate and even conflicting statutory, regulatory, and safety obligations and oversight by different agencies or divisions. Further, when two separate and unrelated entities carry out permitted activities at the same time and in the same location, the potential for accidents greatly increases. Thus, there is very good reason to disallow the permitting of two or more DNR-regulated activities in the same space in any event. But here, the prohibition is plainly required by statute. Under I.C. § 14-37-11-2 and -3, only the owner or operator of a coal mine or a well producing both oil and gas may burn the gas produced from the mine or the well in flares. Because Pioneer does not meet these criteria, it is not entitled to the Permits.

Conclusion

For the foregoing reasons, Respondent is not eligible for the Permits and the DNR's Order directing issuance of the Permits should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2023, the foregoing document filed with the Natural Resources Commission via email at the following address: nrcaopa@nrc.IN.gov. The foregoing was contemporaneously served via email upon Respondents at the following addresses:

Stephen T. Link
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/s/ L. Katherine Boren
L. Katherine Boren

From: Katie Boren
To: NRCAOPA
Cc: slink@pioneeroil.net; Boyko, Ihor; Joseph H. Langerak; Brenda Glenn; Jordan Saner
Subject: Gibson County Coal v. Pioneer Oil, Administrative Cause No. 22-069G
Date: Friday, June 30, 2023 7:02:24 PM
Attachments: image210218.png
Petitioner"s Motion for Summary Judgment.pdf
Affidavit of John Henderson with Exhibits.pdf

Please find Petitioner's Motion for Summary Judgment and supporting exhibits attached for filing and service in the above-referenced matter.

Regards,

Katie Boren (She/Her/Hers)
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