STATE OF INDIANA	)	IN THE MARION SUPERIOR COURT
	) SS:	
COUNTY OF MARION	)	CAUSE NO. 49D13-2101-PL-001599 (Consolidated with 49D13-2101-PL-001844)

SOUTHWESTERN INDIANA CITIZENS FOR QUALITY OF LIFE, INC. and VALLEY WATCH, INC.,

Petitioners,

v.

INDIANA OFFICE OF ENVIRONMENTAL ADJUDICATION, INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, and RIVERVIEW ENERGY CORPORATION,

Respondents.

ORDER ON JUDICIAL REVIEW

This matter came to the Court on the "Verified Petition for Judicial Review of Final Agency Order" filed by Southwestern Indiana Citizens for Quality of Life, Inc. and Valley Watch, Inc., and the "Verified Petition for Judicial Review" filed by Respondent Riverview Energy Corporation on January 19, 2021. The petitions were consolidated for all purposes.

All parties and two *amici curiae,* the Hoosier Environmental Council and Citizens Action Coalition of Indiana, were given an opportunity to submit briefs in this matter. On August 30, 2021, all parties and *amici curiae* participated in oral argument. After considering the parties' petitions, the briefs, and the arguments of the parties and *amici*, the Court hereby finds as follows.

I. Background

The Indiana Department of Environmental Management ("IDEM") is responsible for administering Indiana's air pollution control laws, including the issuance of permits for the

construction of new facilities with regulated air emissions. Ind. Code §§ 13-15, 13-17 *et seq*. On January 25, 2018, Riverview applied for an air permit to construct a coal hydrogenation facility near Dale, Indiana. Riverview notified nearby landowners and delivered a copy of the application to the local library. On October 24, 2018, IDEM notified the public of the application, placed copies of a draft air permit at the local library, its regional office, and on its website, and provided the public instructions as to how to submit comments. On December 5, 2018, IDEM held a public hearing to take oral comments on the draft permit.

At the hearing, Petitioners, their members, their attorneys at EarthJustice, their expert witnesses, and the United States Environmental Protection Agency all submitted comments and received written responses from IDEM. Many of these comments resulted in modifications to the draft permit. On June 11, 2019, IDEM issued a final Prevention of Significant Deterioration/New Source Construction and Part 70 Operating Permit to Riverview.

On July 9, 2019, Petitioners filed a Petition for Administrative Review of the Permit with the Indiana Office of Environmental Adjudication pursuant to the Indiana Administrative Orders and Procedures Act, Ind. Code § 4-21.5 *et seq.* AOPA created OEA as a specialized administrative body to review agency actions of IDEM. Ind. Code § 4-21.5-7 *et seq.* OEA employs environmental law judges ("ELJs") who act as "the ultimate authority" for review of IDEM actions; they have the same authority and responsibilities as other administrative law judges. Ind. Code § 4-21.5-7-5. ELJs conduct *de novo* reviews and determine all issues anew, based upon the evidence at the hearing, independent of any previous findings, and without deference to IDEM.

Beginning on August 3, 2020, OEA conducted a four-day final hearing on the merits of Petitioners' claims. During the hearing, multiple witnesses (mostly experts) testified and dozens of exhibits were tendered by the parties. In a Final Order issued December 17, 2020, the ELJ found

that IDEM properly issued the Permit in compliance with all state and federal statutes, regulations, and guidance.

II. Petitioners' Claims on Judicial Review

The Petitioners claim that OEA applied an incorrect and/or inconsistent burden of proof upon them for purposes of the final hearing that exceeded the burden described in AOPA. In the same breath, Petitioners assert that the AOPA burden of proof for administrative hearings is not ascertainable, and therefore violates their Constitutional due process rights. Petitioners also contend that the OEA should have placed the burden of proof upon IDEM and Riverview rather than the Petitioners. Petitioners recognize that the issues they raise are pure questions of law and they do not contest whether OEA's findings were based upon sufficient evidence. The Court affords no deference to any conclusions of law made by OEA regarding the burden of proof and reviews the issues *de novo*. *Musgrave v. Squaw Creek Coal Co.,* 964 N.E.2d 891, 900 (Ind. Ct. App. 2012), *trans. denied*.

A. Petitioners' Due Process Claims Fail.

To satisfy due process, an administrative decision must be in accord with previously stated, ascertainable standards. *Comm'n on General Education v. Union Township School of Fulton County,* 410 N.E.2d 1358, 1361 (Ind. Ct. App. 1980) (*citing Podgor v. Indiana University,* 381 N.E.2d 1274, 1283 (Ind. Ct. App. 1978)). However, the Petitioners do not argue that the burden of proof was unascertainable. In fact, they claim that that the "substantial evidence" standard applies, that it has been thoroughly developed by the courts, and that it has been applied by OEA "in countless decisions" prior to the Final Order. Petitioners' actual claim is that OEA applied the

standard incorrectly, not that the law was so uncertain that it is unascertainable. The incorrect application of a legal standard is simply an error of law, not a due process violation.

Further, Petitioners waived their due process argument by failing to raise it below. *Kollar v. Civil City of South Bend*, 695 N.E.2d 616, 622 (Ind. Ct. App. 1998), *reh'g denied* ("the Kollars have waived appellate review of this issue by failing to properly raise it below"); *see also* Ind. Code § 4-21.5-5-10 (prohibiting judicial review of issues not raised to the agency). Petitioners concede in their brief that they were aware of this alleged "repeat error" by OEA in "countless decisions" prior to this case but they did not raise the issue with OEA. Petitioners failed to give OEA, IDEM, and Riverview a chance to resolve this issue before the final hearing, and before the Final Order was issued. By failing to raise this issue below, Petitioners waived their right to pursue it on Judicial Review.

B. OEA Applied the Correct Burden of Proof.

Petitioners next claim that OEA applied the incorrect burden of proof, which resulted in an excessively difficult standard they were unable to meet. Petitioners claim that OEA "erroneously interpreted the substantial evidence standard" in a manner that is "wholly unachievable."

AOPA states:

> At each stage of the proceeding, the agency or other person requesting that an agency take action or asserting an affirmative defense specified by law has the **burden of persuasion** and the **burden of going forward with the proof of the request** or affirmative defense**.**

Ind. Code § 4-21.5-3-14(c) (emphasis added). Moreover, "[f]indings must be based upon the kind of evidence that is substantial and reliable." Ind. Code § 4-21.5-3-27(d). Thus, AOPA requires that (1) the ELJ's findings of fact must be based upon the kind of evidence that is substantial and reliable and (2) a petitioner carries the burden of persuasion and the burden of going forward with

the proof of the request for review. And, "[t]he administrative law judge's experience, technical competence, and specialized knowledge may be used in evaluating evidence." *Id.*

OEA's 42-page Final Order unmistakably concludes that Petitioners did not carry their burden to persuade the ELJ that their evidence was of greater weight. In the Final Order, the ELJ noted that because "[t]he evidence in this cause primarily consists of conflicting expert testimony," the ELJ's primary task was to "determine the weight to be given to this testimony." The ELJ weighed the evidence submitted by all parties to determine whose evidence carried the greater weight. The Final Order referred to the "burden of persuasion" several times, noting that Petitioners' evidence was "unpersuasive" or "not persuasive." The ELJ noted that the Petitioners' evidence "failed to demonstrate," "did not demonstrate," was "speculative," "does not support a finding that IDEM erred," and was "unsupported." The ELJ found that the Petitioners "failed to demonstrate" their claims and that their claims were "not been proven by the evidence." The ELJ found that the Petitioners "presented no evidence," "presented no concrete proof," "presented no testimony or evidence," "failed to provide adequate evidence," "offered no evidence," "offered no testimony," "have not produced any testimony or evidence," "have produced no evidence," "do not provide any information," "provided no testimony or evidence," "have not presented credible testimony or evidence," and "simply have not presented adequate testimony or evidence" to support their claims.

To support their argument, the Petitioners argue that they only needed to provide "a scintilla of proof" on administrative review to overturn IDEM's decision to issue the Permit because the Indiana Supreme Court has defined "substantial evidence" as "more than a scintilla; that is, reasonable minds might accept it as adequate to support the conclusion." *Ind. High Sch. Athletic Ass'n, Inc. v. Watson*, 938 N.E.2d 672, 680-81 (Ind. 2010). "[W]hat qualifies as

'substantial' evidence is not substantial at all – requiring nothing more than a mere 'scintilla' of evidence . . . ." *Ind. Dep't of Nat. Res. v. Prosser,* 139 N.E.3d 702 (Ind. 2020) (Slaughter, J., concurring). At oral argument on judicial review, Petitioners' counsel urged that the Petitioners, by presenting a scintilla of evidence in support of their administrative review petition, met their burden of proof to have IDEM's issuance of the Permit overturned. The presentation of a scintilla of evidence by itself is not sufficient to for Petitioners to meet their burden. Petitioners' argument ignores that the challenger of an agency action also bears the burden of persuasion. Riverview and IDEM, in opposing Petitioners' administrative petition, also presented evidence that the ELJ considered in rendering her decision. As set forth above, the Final Order was abundantly clear that the Petitioners failed to persuade the ELJ that the IDEM permitting decision was incorrect.

The Petitioners do not challenge the sufficiency of the evidence supporting the ELJ's findings of fact. The language of the Final Order demonstrates that its findings were based upon the kind of evidence that is substantial and reliable. The Final Order is not just critical of the Petitioners' evidence, it also notes the persuasiveness of the evidence tendered by IDEM and Riverview and draws a sharp contrast between the parties' cases. The language of the Final Order, taken as a whole, demonstrate that the ELJ based her findings of fact upon "the type of evidence that is substantial and reliable," even if she did not use that particular phrase. OEA need not use any particular "magic words" in its orders if there is enough evidence to support its findings and its conclusion. *Jennings Water Inc. v. Office of Env't Adjudication,* 909 N.E.2d 1020, 1024-25 (Ind. Ct. App. 2009), *trans. denied.* The Final Order demonstrates that the greater weight of the evidence supported the positions of IDEM and Riverview, and not the positions of Petitioners. Petitioners had their day in court, and OEA applied the correct standard when it denied their claims.

C. OEA Correctly Placed the Burden of Proof Upon Petitioners.

Finally, Petitioners assert that the ELJ should have placed the burden of proof to support IDEM's decision to issue the Permit upon IDEM and Riverview. It appears that Petitioners have abandoned this argument as they did not raise it in their briefs or at oral argument. Where a party fails to develop a cogent argument, the issue is waived. *Dickes v. Felger*, 981 N.E.2d 559, 562 (Ind. Ct. App. 2012). The issue is also waived because Petitioners never raised it below, and only issues raised before OEA may be pursued upon judicial review. Ind. Code § 4-21.5-50-10.

Even if this argument were not waived, it would be rejected. AOPA places the burden of proof on the petitioner challenging an IDEM action:

> "At each stage of the proceeding, the agency or other person requesting that an agency take action or asserting an affirmative defense specified by law has the burden of persuasion and the burden of going forward with the proof of the request or affirmative defense."

Ind. Code § 4-21.5-3-14(c).

Here, Petitioners were requesting that OEA invalidate and remand the Permit, and were thus the "person requesting that an agency take action." OEA correctly placed the burden of proof upon Petitioners.

III. Riverview's Claims on Judicial Review

On January 19, 2021, Riverview filed a "Verified Petition for Review" ("Riverview's Petition"). Riverview claims that Petitioners lack AOPA standing to pursue this matter, as required by Ind. Code § 4-21.5-3-7(a)(1), and that OEA applied the incorrect legal standard when it determined that Petitioners had standing to pursue this matter under AOPA. While challenging the concept of associational standing under AOPA, Riverview recognizes that this Court is bound by the Indiana Court of Appeals' decision in *Save the Valley, Inc. v. Indiana-Kentucky Electric Corp.,*

820 N.E.2d 677, 679-680 (Ind. Ct. App. 2005), which holds that the doctrine of associational standing is recognized by Indiana courts.

On September 10, 2019, Petitioners filed a Motion for Summary Judgment to establish their AOPA standing. Petitioners' Motion claimed that they have standing to pursue this matter because nine of their members were "aggrieved or adversely affected" by the Permit. Because their members have standing, Petitioners claimed that they have "associational standing" to pursue administrative review. Riverview filed a Cross-Motion for Summary Judgment arguing that Petitioners do not have AOPA standing. Riverview submitted transcripts of the Standing Members' depositions in support of its Cross-Motion.

In an order dated January 22, 2020, OEA granted Petitioners' Motion and denied Riverview's Cross-Motion. The ELJ applied the standard set forth in *Save the Valley*, finding that "[t]he Petitioners meet the requirements for associational standing" because "there is no dispute that at least one of the named members [of the Petitioner associations], in their own right, is aggrieved or adversely affected by the issuance of the Permit"; that "[t]he Petitioners' interest in this proceeding is directly related to their purposes as associations"; and that "[t]he relief requested by the Petitioners does not require the participation by any of the individual members."

Riverview claims that the standard applied by OEA was incorrect as a matter of law. This Court accords no deference to OEA's interpretation of AOPA's standing requirement and reviews the issue *de novo*. *See Musgrave*, 964 N.E.2d at 900. In making its argument, Riverview cites the language of AOPA (Ind. Code § 4-21.5-3-7(a)(1)(B), contending that the Petitioners "alleged only one" of the three grounds for standing. Riverview does not, however, highlight the associational standing requirements set forth in *Save the Valley*, which the ELJ utilized in her summary judgment order recognizing that Petitioners had standing: (1) association members who were individually

aggrieved or adversely affected by IDEM's decision; (2) the association's interest in the administrative action is germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Save the Valley*, 820 N.E.2d at 680 (*citing Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 344 (1977)). The ELJ's order recognizing the Petitioners' associational standing, as set forth above, set forth findings for each of the three standing requirements set forth in *Save the Valley*. Riverview further challenges that ELJ's finding that at least one member of the Petitioners was "aggrieved or adversely affected" by the issuance of the permit. The ELJ concluded that "[i]t is necessary only to show a reasonable belief that a person may be harmed" to prove standing – Riverview contends that application is inconsistent with the text of AOPA and the Supreme Court's analysis in *Huffman v. Indiana Office of Environmental Adjudication*, 811 N.E.2d 806, 812 (Ind. 2004). "[T]o be 'aggrieved or adversely affected,' a person must have suffered or be likely to suffer in the immediate future, harm to a legal interest, be it a pecuniary, property, or personal interest." *Huffman*, 811 N.E.2d at 810 (citations omitted). "[T]he concept of 'aggrieved' is more than a feeling of concern or disagreement with a policy; rather, it is a personalized harm." *Id.,* at 812. "The language of AOPA does not allow for administrative review based on a generalized concern as a member of the public. The statute says 'aggrieved or adversely affected' and this contemplates some sort of personalized harm." *Id. See also Klosinski v. Cordry Sweetwater Conservancy Dist.*, 947 N.E.2d 429, 433 (Ind. Ct. App. 2011), *reh'g denied, trans. denied*, 962 N.E.2d 651 (Ind. 2011) (Klosinskis lacked AOPA standing even though they owned property in the district because they failed to identify a specific harm to a pecuniary, property, or personal interest, and their generalized concerns about the plan were insufficient).

In her Standing Order, the ELJ addressed the argument Riverview raises here:

> [Riverview]'s insistence on concrete proof of harm is problematic. This facility has not been built. Therefore, it is difficult to either prove or disprove the actual impacts the emissions will have. . . . To require concrete proof of actual harm as the standard for aggrieved or adversely affected would prevent the filing of many of the actions and defeat the purpose of administrative review process. Further, it is important to note that this Facility is the first of its kind to be built in the United States, making it more difficult to require concrete proof of harm.

The ELJ specifically found that two of Petitioners' members, Ms. Hess and Dr. Marchand, showed they were aggrieved or adversely affected. Although the evidence supporting these members' claims were based upon personal opinion, the ELJ determined that evidence was substantial and reliable. This scintilla of evidence is sufficient to show these members were individually aggrieved or adversely affected by IDEM's decision.

The Court determines that the ELJ properly held that Petitioners successfully demonstrated they met the requirements of associational standing.

IV. OEA's Motion to Dismiss

Respondent OEA also moved to dismiss itself as a party to the judicial review petition of Southwestern Indiana Citizens and Valley Watch. OEA is the forum before which the Petitioners sought administrative review of IDEM's permitting decision. OEA's sole legal function is to review the administrative actions of environmental agencies such as IDEM. See Ind. Code § 4-21.5-7-3. As such, it cannot properly be named as a party on judicial review of its own administrative decision – OEA is, effectively, a reviewing court, not a party to the administrative proceeding. The Court determines that it should dismiss OEA from this judicial review action.

V. ORDER AND FINAL JUDGMENT

The Court hereby AFFIRMS the Indiana Office of Environmental Adjudication's December 17, 2020 "Findings of Fact, Conclusions of Law, and Final Order" in all respects. The Court DENIES relief as to Riverview's challenge to the Petitioners' associational standing. The Court GRANTS the motion to dismiss of Respondent OEA. The Court DENIES all other pending motions as MOOT.

ENTERED: 12/29/2022

James A. Joven, Judge
Marion Superior Court, Civil Division 13

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