

**OBJECTION TO ISSUANCE OF FESOP RENEWAL
PERMIT NO. 089-44483-00594
MAYA ENERGY, LLC / GARY, LAKE COUNTY INDIANA
2023 OEA 087, OEA CAUSE No.: 22-A-J-5198**

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Presiding ELJ:	Lori Kyle Endris
Party Representatives:	Valerie Tachtiris, Esq., IDEM Angela Lockett, Esq., City of Gary Thomas Baker, Esq., Permittee/Respondent Michael Reeder, Esq., Permittee/Respondent Dorreen Carey, <i>pro se</i> Dr. Linda Kaatz Chary, <i>pro se</i>
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INDIANA OFFICE OF ENVIRONMENTAL ADJUDICATION

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Lori Kyle Endris, *Environmental Law Judge*
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STATE OF INDIANA)
)
COUNTY OF MARION)
)
IN THE MATTER OF:)

BEFORE THE INDIANA OFFICE OF
ENVIRONMENTAL ADJUDICATION

CAUSE NO. 22-A-J-5198

OBJECTION TO ISSUANCE OF FESOP RENEWAL)
FEDERALLY ENFORCEABLE STATE OPERATING PERMIT (FESOP))
PERMIT NO. 089-44483-00594)
MAYA ENERGY, LLC)
GARY, LAKE COUNTY, INDIANA.)

City of Gary and Dorreen Carey)
Petitioners,)
Maya Energy, LLC)
Permittee/Respondent,)
Indiana Department of Environmental Management,)
Respondent.)

FINDINGS OF FACT, CONCLUSIONS OF LAW and FINAL ORDER

This matter comes before the Office of Environmental Adjudication (OEA or Court) on the Indiana Department of Environmental Management's (IDEM) and Maya Energy, LLC's (Permittee or Permittee/Respondent) Motion to Dismiss; and the Court¹ having read the Motions, Responses, Replies and supporting briefs now enters the following Findings of Fact, Conclusions of Law and Final Order.

Findings of Fact

1. On April 27, 2017, IDEM, Office of Air Quality (OAQ) issued a New Source Construction and Federally Enforceable State Operating Permit (Original FESOP) to Permittee, authorizing the construction and operation of a material recovery and recycling facility (Facility) located at 2727 West 35th Avenue, Gary, Lake County, Indiana.

2. On December 7, 2019, Permittee requested an eighteen (18) month extension of its Original FESOP. Thereafter, Permittee requested an additional year extension which ended October 27, 2019.

¹ Environmental Law Judge Lori Kyle Endris assumed jurisdiction over this Cause February 3, 2023.

3. On January 20, 2022, IDEM, OAQ posted a notice on its website² stating the Permittee had applied for a FESOP Renewal (FESOP Renewal or Renewal) which IDEM, OAQ proposed to issue. The notice informed interested parties of the thirty (30) day period in which to submit comments regarding the Renewal. On the same date, IDEM OAQ posted a notice that OAQ would hold a virtual public hearing³ on March 1, 2022 to discuss the proposed Renewal. Addendum to the Technical Support Document (ATSD), p. 1.

4. On April 26, 2022, IDEM issued the renewal of the Original FESOP.

5. On May 12, 2022, City of Gary (City of Gary) filed a timely Petition for Administrative Review (City of Gary Petition) of the FESOP Renewal. The City of Gary Petition claims:

- A. IDEM inappropriately calculated Volatile Organic Compound (VOC) particulate emissions that were limited to the entrance to the Facility.
- B. IDEM did not give Environmental Justice comments due consideration.
- C. Permittee's facility must be set back 2,650 feet from a public school, and the Steel City Academy Charter School is 1056 feet from the Permittee's planned facility.
- D. IDEM failed to verify the Permittee's compliance with solid or hazardous waste permits because the Facility will accept and process solid waste.
- E. The area is not suitable for the placement of the Permittee's facility because of the proximity to a public school, the density of nearby residential properties, and the size and condition of the area roadways.

6. On May 16, 2022, Ms. Dorreen Carey (Petitioner Carey) filed a timely Petition for Administrative Review (Carey Petition) on behalf of Gary Advocates for Responsible Development (GARD). Petitioner Carey did not indicate whether she was acting with GARD's consent, and Petitioner Carey signed the Petition as Dorreen Carey with no reference to GARD in the signature block. Restated as statements, the Carey Petition claims:

- A. IDEM improperly granted the FESOP Renewal because the Permittee/Respondent previously received a permit that elapsed without being used.
- B. IDEM arbitrarily and capriciously issued the FESOP Renewal in violation of the Indiana Administrative Orders and Procedures Act (AOPA), I.C. § 4-21.5-5-14(d)(1).

² <https://www.in.gov/idem/public-notices/>.

³ 326 IAC 2-1.1-6(a)(2) does not require IDEM to hold a public hearing.

- C. IDEM's issuing the FESOP Renewal violated its obligations under Title VI of the Civil Rights Act of 1964.
- D. IDEM's issuing the FESOP Renewal violated its obligations under its Nondiscrimination Policy and Environmental Stakeholder Inclusion Program.
- E. IDEM abused its discretion and arbitrarily and capriciously issued the FESOP Renewal because the Permittee/Respondent failed to construct, operate, or file annual certification compliance documents.

7. On May 19, 2022, OEA issued a Notice of Incomplete Filing, Order to Supplement the Petition and Notice of Proposed Order of Default to both City of Gary and Petitioner Carey finding the petitions "incomplete to serve as a Petition for Administrative Review, per Ind. Code § 4-21.5, *et seq.* and 315 IAC 1, *et seq.*" The Notice ordered City of Gary and Petitioner Carey to supplement their petitions by

- Sending a complete copy of IDEM's action to which the Petitioner objects;
- Showing how they were aggrieved or adversely affected by IDEM's issuance of the FESOP Renewal;
- Sending a copy of the petitions for administrative review to both IDEM and Permittee; and
- Identifying which portions of the FESOP Renewal to which they object.

The parties were ordered to supplement their Petitions on or before June 13, 2022.

8. On May 31, 2022, Petitioner Carey on behalf of GARD filed a one-page letter⁴ (Petitioner Letter) that stated in relevant part: We believe that the Original Petition for Administrative Review and Request for Stay was incomplete in only one of the four identified areas, that is "...a complete copy of the IDEM action to which the Petitioner [Carey on behalf of GARD] objects." Petitioner Letter, p. 1. Other than providing a copy of the permit to the other parties, Petitioner Carey did not provide the information ordered by OEA on May 19, 2022.

9. On June 14, 2022, City of Gary filed a supplemental petition (Supplemental Petition) at 5:31 p.m. on June 13, 2022. Pursuant to 315 IAC 1-3-3(d),⁵ "where the date of filing or service is determined by the date of delivery to or receipt at the [OEA], all filing or service deliveries received after 4:30 p.m., ET, will be deemed to have been received on the next following regular day." City of Gary's Supplemental Petition is considered filed on June 14, 2022 and thus not timely.

⁴ Because Petitioner Carey's response to OEA's Notice did not contain the statutory requirements to comply with I.C. § 4-21.5-3-7, it cannot be considered an amended petition.

⁵ 315 IAC 1-3-3 was originally adopted June 2, 1998. 21 IR 3734.

10. On July 11, 2022, the parties attended the Prehearing Conference.
11. On August 9, 2022, Petitioner Carey informed OEA that she “will no longer represent on behalf of [GARD] but will continue to self-represent in the above-entitled cause” in her Notice to Represent Pro Se.
12. On August 11, 2022, Petitioner Carey filed a Request to the Parties to Confer as Ordered.
13. On August 12, 2022, counsel for Permittee/Respondent filed a Notice of Appearance along with a Motion for a Briefing Schedule on the Justiciability of the Pending Issues. On the same date, Petitioner Carey filed a Motion for a Briefing Schedule on the Justiciability of the Pending Issues.
14. On August 17, 2022, Petitioner Carey filed a Motion to Continue because “[a]dditional time is needed to find and retain experienced counsel in this matter of great public interest to the residents of the City of Gary and proceedings will be of considerable complexity.”
15. On August 19, 2022, OEA issued a Scheduling Order that stated, “[i]f GARD intends to proceed as a party in this cause, an Appearance by its legal counsel is due by September 9, 2022.”
16. On September 9, 2022, Petitioner Carey notified OEA and the parties that “the group GARD has been unable to secure legal counsel in this cause by September 9, 2022” and again confirmed that she would be representing herself.
17. On September 12, 2022, Dr. Lin Kaatz Chary (Dr. Chary) submitted a Request to Enter Appearance as Individual Party. Dr. Chary was identified as a GARD member in the Carey Petition but did not sign it or provide her address/telephone number.
18. On September 30, 2022, both Permittee/Respondent and IDEM filed Motions to Dismiss both Petitioners.
19. On October 31, 2022, OEA granted Dr. Lin Katz Chary’s (Dr. Chary) Request to Enter Appearance as Individual Party.
20. On November 15, 2022, Petitioner Carey and Dr. Chary filed a Joint Response (Joint Response) to Permittee/Respondent’s and IDEM’s Motions to Dismiss.
21. On November 16, 2022, City of Gary filed Responses to Permittee/Respondent’s and IDEM’s Motions to Dismiss.
22. On December 1, 2022, Permittee/Respondent filed a Reply in Support of its Motion to Dismiss Petitioners Carey, Dr. Chary and City of Gary. On the same date, IDEM filed its Reply in Opposition to Petitioners’ Responses to its Motion to Dismiss. Lastly, on the same date, Petitioner Carey and Dr. Chary filed a Joint Praecipe for Oral Argument.

23. On December 2, 2022, Permittee/Respondent filed a Response to Petitioner Carey's and Dr. Chary's Joint Praecepte for Oral Argument.

24. On December 8, 2022, Petitioner Carey and Dr. Chary filed their Reply to Permittee/Respondent's Response to their Praecepte for Oral Argument.

Conclusions of Law

1. This is a Final Order issued pursuant to Ind. Code (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.

2. IDEM is authorized to implement and enforce Indiana environmental statutes and rules promulgated relevant to those statutes. See I.C. § 13-13 *et seq.* and I.C. § 13-14-1-11.5. IDEM can only consider the relevant statutes and regulations pertaining to the permit when deciding whether to issue it. *American Suburban Utilities*, 2019 OEA 48, 53. Whenever a permit is required by any rule of the Environmental Rules Board under I.C. § 13-15-1 for the construction, installation, operation, or modification of any facility, equipment, or device, the permit may be issued only after IDEM has approved the plans and specifications; and determined that the facility, equipment or device meets the requirements of the rule(s) pertaining to that permit. I.C. § 13-15-3-5.

3. As state agencies, IDEM and OEA only have the authority to take those actions granted by law. "An agency, however, may not by its rules and regulations add to or detract from the law as enacted, nor may it by rule extend its powers beyond those conferred upon it by law." *Lee Alan Bryant Health Care Facilities, Inc. v. Hamilton*, 788 N.E.2d 495, 500 (Ind. Ct. App. 2003).

4. OEA has jurisdiction over the decisions of the Commissioner of IDEM and the parties to the controversy pursuant to I.C. § 4-21.5-7-3. In addition, OEA is governed by the regulations found under 315 IAC 1 *et seq.* In this Cause, OEA's review is limited to determining whether IDEM complied with applicable statutes and regulations when it issued the FESOP Renewal. I.C. § 4-21.5-7-3; *Blue River Valley*, 2005 OEA 1, 11. If the IDEM does not have the regulatory authority to address certain issues, the OEA does not have the authority to overturn a permit on the basis that IDEM failed to consider these issues.

5. To appeal a decision of the Commissioner of IDEM, I.C. § 4-21.5-3-7(a)(1)⁶ requires 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 affected by the order; or

⁶ See also, 315 Indiana Administrative Code 1-3-2(b)(3) (IAC).

(C) the petitioner is entitled to review under any law.

6. I.C. § 13-15-6-2 requires a written request for an adjudicatory hearing must do the following:

- (1) State the name and address of the person making the request.
- (2) Identify the interest of the person making the request.
- (3) Identify any persons represented by the person making the request.
- (4) State with particularity the reasons for the request.
- (5) State with particularity the issues proposed for consideration at the hearing.
- (6) Identify the permit terms and conditions that, in the judgment of the person making the request, would be appropriate in the case in question to satisfy the requirements of the law governing permits of the type granted or denied by the commissioner's action.

7. In a case involving an appeal of a permit, 315 Indiana Administrative Code 1-3-2(b)(4)(A) (IAC) requires a petitioner to also include:

- (i) Environmental concerns or technical deficiencies related to the action of the commissioner that is the subject of the petition.
- (ii) Permit terms and conditions that the petitioner contends would be appropriate to comply with the law applicable to the contested permit.

8. Motions to dismiss relying upon Ind. Trial Rule 12(B)(6) (Ind. Tr. R.) for failure to state a claim upon which relief can be granted tests the legal sufficiency of a claim, not the facts supporting it. *Gray v. Westinghouse Electric Corp.*, 624 N.E.2d 49, 52 (Ind. Ct. App. 1993), *trans. denied*. The Court must view the pleadings in a light most favorable to the non-moving party and must draw every reasonable inference in favor of that party. *Lattimore v. Amsler*, 758 N.E.2d 568 (Ind. Ct. App. 2001). In a 12(B)(6) motion, the Court is required to take as true all allegations upon the face of the complaint and may only dismiss if plaintiff would not be entitled to recover under any set of facts admissible under the allegations of the complaint.” *Dixon v. Siwy*, 661 N.E.2d 600, 603 (Ind. Ct. App. 1996).

9. OEA reviews IDEM's decisions to determine whether IDEM's decision conformed with controlling statutes and regulations. In their petitions for administrative review, Petitioners are required to show that the Permit Renewal did not meet applicable statutes and regulations. Allegations that fail to raise any issue concerning compliance with statutory or regulatory legal requirements fail to state a valid claim for which relief may be granted. *Affordable Sewer Service, LLC*, 2014 OEA 1, 6.

Jurisdiction

Dr. Chary did not comply with the statutorily prescribed procedures necessary to invoke personal jurisdiction.

10. The State Court of Appeals has held that jurisdiction may not be invoked until the individual seeking review has complied with the statutorily prescribed procedures. *City of North Vernon v. Funkhouser*, 725 N.E.2d 898, 904 (Ind. Ct. App. 2000). 315 IAC 1-3-2(b)(1) states, “The petition for administrative review shall contain the following information: (A) name; (B) address; (C) telephone number of *each* person filing the petition.” (emphasis added). *See also*, Ind. Tr. R. 11 states, “a party who is not represented by an attorney shall sign his pleading and state his address.” Dr. Chary’s address and telephone number did not appear on either the Carey Petition or the Petitioner Letter and thus did not fulfill the requirements of 315 IAC 1-3-2(b)(1).

11. The timing requirements to file a petition for administrative review are mandatory for a court to acquire jurisdiction where the review is sought from an administrative determination. *State v. Van Ulzen*, 456 N.E.2d 459, 464 (Ind. Ct. App. 1983). OEA may only assume jurisdiction over petitions for administrative review which are timely filed.

Pursuant to I.C. § 13-15-6-1(b), a party has thirty (30) days from the date an air permit is issued to file a petition for administrative review. I.C. § 4-21.5-3-2(a) requires three (3) days to be added to that timeframe for service by United States mail. Thus, a party has thirty-three (33) days from the date IDEM issues an air permit to seek administrative review. Because the Permit was issued April 26, 2002, the petition for administrative review had to be filed by May 29, 2002. Dr. Chary did not file a petition for administrative review in this Cause by the deadline.

12. On September 12, 2022, Dr. Chary submitted a Request to Enter Appearance as Individual Party. The wording of the Request in its entirety is as follows:

Comes now Lin Kaatz Chary and moves this court to enter my appearance as an individual party in the appeal of the above captioned matter. I was a participant party as a member of GARD in the original proceeding⁷ and personally participated in the IDEM process which is the subject of this appeal. I am fully aware of the issues in this matter and of the obligations of parties in this appeal. I am a resident of Gary and I am personally aggrieved by the decision of IDEM which is the subject of this appeal. As a result of indigency, GARD as a group was unable to find legal counsel by the September 9, 2022 deadline required by the Judge. Therefore, I respectfully move the Indiana Office of Environmental Adjudication to add me in my personal capacity as a party in the above captioned appeal. / s / Linda R. Kaatz Chary

⁷ Dr. Chary was not a participant party as a member of GARD in the original proceeding as the original petition did not comply with 315 IAC 1-3-2(b)(1).

I.C. § 4-21.5-3-21 states,

(a) Before the beginning of the hearing on the subject of the proceeding, the administrative law judge shall grant a petition for intervention in a proceeding and identify the petitioner in the record of the proceeding as a party if:

(1) the petition:

(A) is submitted in writing to the administrative law judge, with copies mailed to all parties named in the record of the proceeding; and

(B) states facts demonstrating that a statute gives the petitioner an unconditional right to intervene in the proceeding; or

(2) the petition:

(A) is submitted in writing to the administrative law judge, with copies mailed to all parties named in the record of the proceeding, at least three (3) days before the hearing; and

(B) states facts demonstrating that the petitioner is aggrieved or adversely affected by the order or a statute gives the petitioner a conditional right to intervene in the proceeding.

The language in Dr. Chary's Request does not comply with I.C. § 4-21.5-3-21 because the Request to Enter Appearance did not contain the statements required by I.C. § 4-21.5-3-21(a)(1) or (2). Moreover, the Request does not qualify as a Petition for Administrative Review because it did not comply with the required statutory procedures and was not timely filed. As a result, Dr. Chary did not qualify to become a petitioner in this Cause.

City of Gary did not comply with the statutorily prescribed procedures necessary to invoke personal jurisdiction.

13. In a case involving a county bringing claims on behalf of its citizens, the Indiana Supreme Court found that a county was unable to assert the public standing doctrine because the county itself was not a citizen. *Bd. of Comm'rs of Union County v. McGuinness*, 80 N.E.3d 164, 169 (Ind. 2017). The Court found that the county could not assert associational standing because it was not an association. *Id.* at 170. Citing *Bd. of Comm'rs v. Kokomo City Plan Com*, 263 Ind. 282, 295 (Ind. 1975), the Court found that although a state may act in *parens patriae* on behalf of its citizens, a county may not because a county has no sovereign powers. *Id.* at 170. OEA's independent research has not revealed any Indiana caselaw addressing whether a city may bring claims on behalf of its citizens.

14. I.C. § 4-21.5-3-7(a)(1)(B) and 315 IAC 1-3-2(b)(3) require that a petitioner "state facts demonstrating that the petitioner is aggrieved or adversely affected by the order." (emphasis added). The Indiana Supreme Court has held "to 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 v. Office of Envir. Adjud.*, 811 N.E.2d 806, 810 (Ind. 2004). “[A]ggrieved is more than a feeling of concern or disagreement; it is a personalized harm.” *Id.* at 812.

15. Under I.C. § 4-21.5-1-11, “person” is defined as “an individual, agency, political subdivision, partnership, corporation, limited liability company, association or other entity of any character;” thus, City of Gary is considered a person under Indiana’s Administrative Orders and Procedures Act (AOPA). In its petition for administrative review, City of Gary included no statement that the City had suffered, or would likely suffer in the immediate future harm, to a legal interest and so did not comply with I.C. § 4-21.5-3-7(a)(1)(B) and 315 IAC 1-3-2(b)(3).

Even assuming the Supplemental Petition was timely filed, the Supplemental Petition contained only one sentence tangentially related to I.C. § 4-21.5-3-7(a)(1)(B) and 315 IAC 1-3-2(b)(3): “The City of Gary is adversely affected by the granting of this permit as the development contemplated by Maya Energy LLC would have a negative impact on the air, water, quality of life and self-esteem of the citizens of Gary, IN.” Supplemental Petition, p. 4. City of Gary does not assert how the City itself will be aggrieved or adversely affected by the FESOP Renewal. A perfunctory assertion of being adversely affected does not satisfy the requirements of I.C. § 4-21.5-3-7(a)(1)(B) and 315 IAC 1-3-2(b)(3) and thus does not invoke OEA’s jurisdiction. *See In re Objection to the Issuance of the Modification to Permit FP# 82-02 Laubscher Meadows Landfill, Vanderburgh County, Indiana 1997 IN ENV LEXIS 11.*

Petitioner Carey did not comply with the statutorily prescribed procedures necessary to invoke personal jurisdiction.

16. In her Petition, Petitioner Carey stated, “GARD members and Gary residents Kimmie Gordon, Lin Katz Chary, Carolyn McCrady, Lori Latham, and Jennifer Rudderham who live, work and recreate in Gary, Indiana would be aggrieved and adversely affected.”⁸ Carey Petition, p. 2. Neither the Carey Petition nor the Petitioner Letter contain facts demonstrating that Petitioner Carey is aggrieved or adversely affected by the order. Again, a perfunctory assertion of being aggrieved or adversely affected is insufficient to invoke OEA’s jurisdiction. *Id.*

17. In the Joint Response to Permittee/Respondent’s Motion to Dismiss, Petitioner Carey and Dr. Chary stated,

. . . [T]he granting of this renewal will demonstrably exacerbate the already existing burden of air pollution and waste issues in the environmental justice community of Gary, including by significantly increasing truck traffic to and from the proposed facility. It will also cause negative quality of life and health impacts resulting from the increased noise, dust, odors and facility emissions. These impacts will be especially noxious for the Steel City Academy, a K-12 charter school, immediately adjacent to the proposed

⁸ Petitioner does not have standing to bring a claim on behalf of another person. *Objection to the Issuance of Permit Approval No. IN LA 000614*, 2002 OEA 33, 39; *see also, Huffman v. Office of Env’tl Adjudication*, 811 N.E.2d 806 (Ind. 2004).

facility thereby physically endangering the students and staff and exposing them to significant environmental pollutants.

Joint Response, p. 2. The harm necessary to qualify for administrative review must be personal to a petitioner. None of the details contained in the Joint Response show how Petitioner Carey has suffered, or would likely suffer in the immediate future, harm to a legal interest of a pecuniary, property, or personal interest as required by *Huffman*.⁹ Moreover, even assuming the statement in the Joint Response contained the facts demonstrating that Petitioner Carey is aggrieved or adversely affected by IDEM's action, the facts were required to be pled in the petition for administrative review, and they were not.

18. Other than providing a copy of the Permit to IDEM and the Permittee/Respondent, Petitioner Carey did not comply with OEA's May 19, 2022 Notice of Incomplete Filing, Order to Supplement the Petition and Notice of Proposed Order of Default to amend the petition with facts explaining how she was aggrieved or adversely affected by IDEM's issuance of the FESOP Renewal. Notwithstanding, Petitioner Carey could have amended the petition *sua sponte* to include a statement of facts demonstrating that the petitioner is aggrieved or adversely affected by the order. A petition for administrative review

may be amended as a matter of course at any time within thirty (30) days after the earlier of the following dates:

(1) The initial prehearing conference.

(2) The filing of a motion to dismiss.

Otherwise, a party may amend his or her petition only by leave of the presiding ELJ or by written consent of all parties.

315 IAC 1-3-2(d).

Here, the earlier date was the July 11, 2022 initial prehearing conference; thus, the petition for administrative review could have been amended without leave or consent by August 10, 2022. Instead, by her own characterization, Petitioner Carey provided "details regarding their residential status, work life, recreation and health" in the Joint Response to Permittee/Respondent's Motion to Dismiss. Joint Response, pp. 5 – 6. The perfunctory assertion of being aggrieved or adversely affected is insufficient to invoke OEA's jurisdiction. *Laubscher Meadows, supra*.

When petitioners fail to comply with mandatory statutory requirements for bringing a petition for administrative review before OEA, OEA lacks jurisdiction to hear the petitions. *Kaminsky v. Medical Licensing Bd. Of Ind.*, N.E.2d 492, 497 (Ind. Ct. App. 1987); *In re Objection to the Issuance of Permit Approval No. 13725 Town of New Whiteland, Indiana*, (OEA 2001).

⁹ The language of AOPA does not allow for administrative review based on a generalized concern as a member of the public. *Huffman*, 811 N.E.2d at 812.

Issues raised by City of Gary

19. City of Gary claims that IDEM inappropriately calculated VOC and particulate emissions limited to the entrance to the Facility “when . . . increased truck traffic to achieve the delivery and shipment of solid waste over City roadways and through City neighborhoods is integral to and necessary for the 24 hour/day operation of the facility at a rate of 474 trucks/day, 51,488 miles/year.” City of Gary Petition, p. 2.

326 IAC 1-2-73 defines “source.” The portion of the regulation applicable to Permittee/Respondent’s Facility reads a source is “an aggregation of one (1) or more stationary emissions units that are located on one (1) piece of property or on contiguous or adjacent properties[,] are owned or operated by the same person (or by persons under common control) and belong to a single major industrial grouping.” . . . A source does not include mobile sources, nonroad engines, or nonroad vehicles.”

IDEM does not have authority to regulate mobile source emissions, and OEA cannot overturn a permit based on issues IDEM does not have the authority to address. *Troyers*, 2021 OEA 12, 17.

20. City of Gary “believes that in order to responsibly and comprehensively consider the health effects of the community and the Environmental Justice Impact of this decision, that it is appropriate to calculate the impact of all potential emissions integral to and necessary for the operation of that facility.” City of Gary Petition, p. 2. City of Gary did not identify any legal authority that would allow IDEM to deny a permit based solely upon environmental justice impacts. Moreover, there exist no statutes or regulations which require IDEM to consider environmental justice Impacts when determining whether to issue a permit. When IDEM does not have statutory or regulatory authority to address an issue, OEA does not have the authority to overturn a permit on the basis that IDEM failed to consider that issue. *Id.*

21. City of Gary claims the Steel City Academy Charter School is 1,056 feet from the Facility which violates a 2,650-foot setback requirement but did not provide legal authority to support how the setback is related to the issuance of the permit. City of Gary Petition, p. 3. Building codes at the state level are governed by the Indiana Fire Prevention and Building Safety Commission under title 675 of the Indiana Administrative Code. Because IDEM has no authority over setback requirements, OEA does not have jurisdiction to hear disputes over setback requirements. Setback requirements are addressed at the local level. When IDEM does not have statutory or regulatory authority to address an issue, OEA does not have the authority to overturn a permit on the basis that IDEM failed to consider that issue. *Id.*

22. Without citing to any legal authority, City of Gary claims IDEM failed to verify the Permittee’s compliance with solid or hazardous waste permits because the Facility will accept and process solid waste. City of Gary Petition, p. 3. I.C. § 13-19-4, *et seq.* requires applicants for solid and hazardous waste permits to submit a good character disclosure that includes information related to prior civil, administrative, or criminal violations of any state or federal environmental protection law. I.C. § 13-19-4-3. Although IDEM has the authority to regulate

solid and hazardous waste facilities, it does not have the authority to apply statutory requirements pertaining to solid and hazardous waste facilities to facilities seeking an air permit. Simply stated, OEA cannot overturn an air permit based on a requirement for a solid and hazardous permit applicant.

23. City of Gary claims the area is not suitable for the placement of the Permittee's facility because of the proximity to a public school, the density of nearby residential properties, and the size and condition of the area roadways. City of Gary Petition, p. 3. Because IDEM does not have the authority to evaluate zoning or other local requirements made by local government, OEA does not have the authority to review these issues. *Robert Lynn Company, Inc.*, 2011 OEA 136, 139.

24. City of Gary's claims fail to state a claim upon which relief can be granted under Ind. Tr. R. 12 (B)(6) and must be dismissed.

Issues raised by Petitioner Carey

25. Petitioner Carey contends "[t]he original new source construction and FESOP permit should not have been "renewed" and "renewal" is improper under AOPA. Carey Petition, p. 5. Petitioner Carey first argues that because the Permittee/Respondent did not commence construction prior to the expiration of the Original Permit, IDEM should have revoked the Original FESOP rather than issue the FESOP Renewal. Carey Petition, p. 5. The revocation of the Original FESOP issued in 2017 is not related to issues with respect to the appeal of the FESOP Renewal. The time to appeal the Original FESOP has expired. Additionally, IDEM's decision to revoke an air permit is discretionary. 326 IAC 2-1.1-9(5) states

Any permit to construct or operate or any permit revision approval, permit modification approval, or source modification approval granted by the commissioner *may* be revoked for . . . failure to commence construction of the source or emissions unit within eighteen (18) months from the date of the issuance of the permit or if, during the construction of the source or emissions unit, work is suspended for a continuous period of one (1) year or more.

(emphasis added). AOPA does not confer OEA authority to review IDEM's discretion not to act. *DaveCo Farms, LLC*, 2009 OEA 53, 60.

26. Petitioner Carey cites *Ind. Dep't of Env'tl. Mgt. v. Chemical Waste Mgt.*, 643 N.E.2d 331, 336 (Ind. 1994) and I.C. § 13-19-4 *et seq.* to argue "IDEM is authorized to deny a permit on a single ground even where IDEM has earlier concluded that a violation did not warrant suspending or revoking the applicant's existing Indiana waste management permit." I.C. § 13-19-4 *et seq.*, Indiana's Good Character Law, is only applicable to solid and hazardous waste permits. As such, I.C. § 13-19-4 cannot be applied to the issuance of a FESOP Renewal. *Springfield Environmental C/D Site*, 2012 OEA 45, 54.

With respect to *Ind. Dep't of Env'tl. Mgt. v. Chemical Waste Mgt*, the Indiana Supreme Court actually stated, “[t]he Commissioner also can deny a permit based upon *any violation of an Indiana environmental statute or rule*, even where IDEM earlier concluded that the violation did not warrant suspending or revoking the applicant's existing Indiana waste management permit.” *Id.* at 335 – 336. (emphasis added). The case does not support Petitioner Carey’s argument.

27. With respect to the Annual Compliance Certifications (ACCs), IDEM acknowledged the lack of ACCs and stated, “Maya Energy has not submitted any ACC to IDEM, OAQ. IDEM is reviewing this matter and will take appropriate action.” ASTD, p. 4. IDEM then set forth its informal and formal enforcement processes. *Id.* IDEM has the discretion to decide whether to pursue enforcement when IDEM observes a violation of its rules. *Mr. Gary Decker Grant County*, 2002 OEA 9, 11 (“Petitioners cannot. . .challenge IDEM’s discretionary enforcement activities through [OEA]”); *Objection to the Issuance of Permit Approval No. AW 4851 Clark Brothers, White County*, 2000 OEA 10, 12; *American Suburban Utilities*, 2019 OEA 48, 54 - 55 (OEA has no authority to grant relief on potential enforcement issues). The fact that IDEM did not initiate an enforcement action regarding the ACCs prior to the FESOP Renewal has no relevance to its authority to issue the FESOP Renewal.

28. Petitioner Carey argues IDEM disregarded the community’s concerns without sufficient justification¹⁰ but she did not identify any statute or regulation that authorizes IDEM to deny a permit or justify its issuance on the basis of a community’s concerns. IDEM responded to the written comments it received including those submitted by Petitioner Carey. ATSD, pp. 3 – 4, 38 – 39, 52 – 54 and Appendix C, pp. 84 – 85. IDEM is under no obligation to change a permit simply because it receives public comments. *AquaSource Services and Technology*, 2002 OEA 41, 47.

29. Petitioner Carey next contends IDEM arbitrarily and capriciously issued the FESOP Renewal¹¹ in violation of I.C. § 4-21.5-5-14(d)(1).¹² Carey Petition, p. 7. A decision is deemed arbitrary and capricious when it is “patently unreasonable and is made without consideration of the facts and in total disregard of the circumstances.” *Ind. Alcohol & Tobacco Comm'n v. Spirited Sales, LLC*, 79 N.E.3d 371, 380 (Ind. 2017) (quoting *A.B. v. State*, 949 N.E. 2d 1204, 1217 (Ind. 2011)). An arbitrary and capricious decision will lack any basis which might lead a reasonable person to the same conclusion. *Id.* Thus, an action of an administrative agency is arbitrary and capricious only where there is no reasonable basis for the action. *Id.* (citing *Breitweiser v. Ind. Office of Env'tl. Adjudication*, 810 N.E. 2d 699, 702 (Ind. 2004)).

Petitioner Carey argues IDEM’s decision was arbitrary and capricious “by the fact that Maya Energy LLC’s registration with the Indiana Secretary of State’s office was dissolved at some

¹⁰ Carey Petition, p. 6.

¹¹ Petitioner Carey states Permittee “slept on its right to use the permit” because the Permittee did not begin construction/operation and “as a result, the permit was constructively revoked or lapsed.” Carey Petition, p. 4. There exists no statute or regulation that constructively revokes a FESOP.

¹² I.C. § 4-21.5-5 relates to petitions for judicial review and not petitions for administrative review.

point because, at a minimum, Maya did not file legally required compliance reports.” Carey Petition, p. 7. Petitioner Carey’s argument is without merit. I.C. § 23-0.5-6-3(d) recognizes that reinstatement of an entity cures any issue from administration because (1) [t]he reinstatement relates back to and takes effect as of the effective date of the administrative dissolution and (2) [t]he domestic filing entity resumes carrying on its activities and affairs as if the administrative dissolution had never occurred. IDEM addressed this issue. ATSD at 44.

30. Petitioner Carey argues,

COVID cannot be documented as a reason for FESOP Renewal. . . IDEM accepted the COVID reason, however, the record is devoid of any facts that support Maya’s assertion and IDEM’s reason for accepting the excuse. . . Apparently, Covid-19 had become the new alternative to ‘the dog ate my homework excuse’. The Respondent was mandated the second time by IDEM to begin construction by October 27, 2019. Covid-19 did not make an appearance in the U.S. until January of 2020.

Carey Petition, pp. 7 – 8. Petitioner Carey provided no factual or legal support why IDEM’s acceptance of the “COVID reason” is relevant to the FESOP Renewal. Because Petitioner Carey also provided no documentary evidence or reference any document other than the generic “record” in which “IDEM accepted the COVID reason,” the contention is speculative. Speculation without supporting evidence is not sufficient to support a decision to overturn the FESOP Renewal. *Christners*, 2020 OEA 16, 22.

31. Petitioner Carey argues, “road construction projects continued and were completed during the time that Maya failed to begin construction pursuant to its original permit and the extension period” and provides links to the projects INDOT completed. Carey Petition, p. 8. How many road construction projects INDOT completed in 2019 and 2021 is not relevant to whether IDEM properly issued the FESOP Renewal.

32. Petitioner Carey contends IDEM’s issuing the FESOP Renewal violated its obligations under Title VI of the Civil Rights Act of 1964.¹³ Carey Petition, pp. 9 - 10. Petitioner Carey stated, “the fact that the IDEM failed to meaningfully address Environmental Justice and Title VI issues and concerns affecting the permitting of the Maya facility contributes to IDEM’s overall failure to protect human health and the environment through their permitting process.” Petitioner Carey’s Joint Response, p. 4. Petitioner Carey argues IDEM failed to respond to recommendations concerning environmental justice raised by a U.S. Environmental Protection Agency (EPA) letter and so issued the FESOP Renewal contrary to federal law, and IDEM violated its Nondiscrimination Policy and Environmental Stakeholder Inclusion Program. Carey Petition, pp. 9 – 10.

On March 11, 2022, EPA submitted its review (EPA Review Letter) of the draft FESOP Renewal and associated permit files to IDEM. EPA Review Letter, p. 1 EPA’s comments did not identify any legal deficiency with the FESOP Renewal, and proffered recommendations. *Id.*, pp.

¹³ OEA does not have statutory authority to review Title VI claims.

1 – 3. First, IDEM is under no obligation to change a permit simply because it receives public comments. *AquaSource Services and Technology*, 2002 OEA 41, 47. Moreover, IDEM responded¹⁴ to EPA’s recommendations to reflect IDEM

- conducted an environmental justice analysis;¹⁵
- confirmed the construction permit requirements are protective;¹⁶
- considered opportunities to reduce the environmental impacts of the Renewed Permit;¹⁷
- assessed its obligations under Title VI of the Civil Rights Act of 1964;¹⁸ and
- referenced its Nondiscrimination Policy¹⁹ and Environmental Stakeholder Inclusion Program²⁰ in how the agency took actions to prevent discrimination.

There exist no statutes or regulations authorizing IDEM to deny a permit based solely on environmental justice concerns. IDEM is authorized to determine whether a permit should be issued by applying the relevant statutes and regulations pertaining to permits and can only consider the relevant statutes and regulations when deciding whether to issue the permit. *American Suburban Utilities*, 2019 OEA 48, 53. When IDEM does not have statutory or regulatory authority to address an issue, OEA does not have the authority to overturn a permit on the basis that IDEM failed to consider that issue. *Troyers*, 2021 OEA 10, 17.

33. Petitioner Carey’s claims fail to state a claim upon which relief can be granted under Ind. Tr. R. 12 (B)(6) and must be dismissed.

Praeceptum for Oral Argument

34. On December 1, 2022, Petitioner Carey and Dr. Chary filed a Praeceptum for Oral Argument, proposing it be scheduled anytime between January 6 and 31, 2023. On December 2, 2022, Permittee/Respondent filed its Response. On December 8, 2022, Petitioner Carey and Dr. Chary filed a Reply.

In the Reply, Petitioner Carey and Dr. Chary contended,

Petitioners believe legal arguments are best addressed orally where the Judge has an opportunity to ask questions and to request the parties to confront their opponents’

¹⁴ See Addendum to the Technical Support Document (ATSD) pp. 28 – 35.

¹⁵ ATSD, pp. 5 – 10.

¹⁶ ATSD, p. 4.

¹⁷ ATSD, pp. 15 – 24.

¹⁸ ATSD, pp. 6 – 7.

¹⁹ https://www.in.gov/idem/health/files/idem_policy_A-008-AW-18-P-R5. See also, <https://www.in.gov/idem/health/environmental-stakeholder-inclusion/>

²⁰ ATSD, pp. 7 – 8.

arguments. Due Process has traditionally meant an opportunity to be 'heard' and justice and fairness are best assured in that traditional manner.

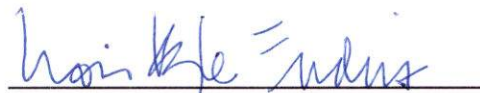
Reply, p. 2. Petitioner Carey provided no legal support for her contention. The record reflects that Petitioner Carey did not comply with OEA's Notice of Incomplete Filing, Order to Supplement the Petition and Notice of Proposed Order of Default to correct the statutory issues with her Petition; City of Gary filed a Supplemental Petition. Thereafter, Petitioner/Respondent and IDEM filed Motions to Dismiss. Petitioner Carey and Dr. Chary filed a Response to both Motions to Dismiss. Petitioner/Respondent and IDEM filed Replies all of which provided the opportunity to be heard and to confront the other parties' arguments.

Moreover, a motion to dismiss under T.R. 12(B)(6) is made to test the legal sufficiency of a claim, not the facts that support it. *Gray v. Westinghouse, supra*. At issue here were the sufficiency of the pleadings, the legal basis for three (3) parties to invoke OEA's jurisdiction, and the jurisdiction of OEA over the claims raised. Holding an oral argument so that the parties could again confront their opponents' factual arguments would not be in keeping with judicial economy²¹ or change the outcome of the conclusions set forth above.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Petitioner Carey and Dr. Chary's Praecept for Oral Argument is hereby **DENIED**. IDEM's and Permittee/Respondent's Motions to Dismiss are hereby **GRANTED** and the Petitions for Administrative Review are hereby **DISMISSED** for lack of jurisdiction and failure to state a claim upon which relief can be granted.

You are further notified that pursuant to provisions of Ind. Code § 4-21.5-7-5, the Office of Environmental Adjudication serves as the ultimate authority in administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is a Final Order subject to Judicial Review consistent with the applicable provisions of Ind. Code § 4-21.5-5 et seq. Pursuant to Ind. Code § 4-21.5-5, a Petition for Judicial Review of a Final Order is 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 15th day of, 2023 in Indianapolis, IN.



Hon. Lori Kyle Endris
Environmental Law Judge
frontdesk@oea.IN.gov

²¹ The term "judicial economy" means the efficient and concise use of judicial time and effort in the administration of justice. *Whiteco Industries, Inc. v. Nickolick*, 549 N.E.2d 396, 398 (Ind. Ct. App. 1990).

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