Filed: 11/10/2025 7:04 PM
Morgan Circuit Court
Morgan County, Indiana

STATE OF INDIANA	)	MORGAN COUNTY CIRCUIT COURT
	)	
COUNTY OF MORGAN	)	CAUSE NO. 55C01-2503-RA-000691

HOOSIER ENVIRONMENTAL COUNCIL,	)
Petitioner,	)
	)
INDIANA DEPARTMENT OF ENVIRONMENTAL	)
MANAGEMENT; and INDIANAPOLIS POWER & LIGHT	)
COMPANY d/b/a AES INDIANA-EAGLE VALLEY	)
GENERATING STATION,	)
Respondents.	)

HOOSIER ENVIRONMENTAL COUNCIL'S CONSOLIDATED REPLY BRIEF IN SUPPORT OF PETITION FOR JUDICIAL REVIEW

November 10, 2025

TABLE OF CONTENTS

INTRODUCTION

This is a Clean Water Act case involving Eagle Valley's wastewater discharges to the White River and the NPDES permit that allows those discharges. The discharges contain coal combustion residuals ("CCR"), the result of a decades-long practice of storing coal ash in unlined ponds that leached into surrounding groundwater. IDEM issued to AESI the NPDES permit that governs Eagle Valley's discharges, and HEC brought this challenge on the basis that the Permit violates the Clean Water Act and its implementing regulations.

While the technical aspects of this case are complex, the fundamental question is simple: Does the permit violate the Clean Water Act?

In its Response Brief, AESI incorrectly frames this case as an improper "challenge to AESI's compliance with the federal CCR Rule." AESI Resp. Br. at 15. In turn, IDEM continues to argue that HEC "incorrectly applies CCR Rules to the NPDES Permit." IDEM Resp. Br. at 12. But that is not what this case is. To be sure, HEC disagrees with Respondents as to the role and relevance of the CCR Rule when assessing the Eagle Valley permit. But each of HEC's claims rest on uncontested record evidence and settled law showing that the NPDES Permit IDEM issued for Eagle Valley violates the CWA and its implementing rules:

• **CCR-Related Discharge Claim.** Under the CWA, IDEM was required to, but did not, impose Best Available Technology ("BAT")-based permit limits on the coal ash contaminants deemed "toxic pollutants" in Eagle Valley's discharges based on the performance of the facility's reverse osmosis treatment system already in use. The NPDES Permit authorizes Eagle Valley to continuously discharge wastewater to the White River that contains coal-ash pollutants including mercury, arsenic, lead, and other heavy metals. These pollutants originate from Eagle Valley's unlined, leaching coal-ash ponds that have contaminated area groundwater. That groundwater is

pumped from the aquifer and treated by a reverse-osmosis ("RO") system before being used as process and cooling water at the plant. The RO system generates a secondary waste stream containing the removed coal-ash pollutants. Instead of requiring disposal, the Permit allows AESI to return that waste stream to the spent cooling water that is discharged, untreated, to the White River. None of these facts are in dispute. *See* IDEM Resp. Br. at 12; AESI Resp. Br. at 10–11; HEC Opening Br. at 4–8. More importantly, all of them were pled in HEC's administrative pleading and must be taken as true by the Court in determining whether the administrative law judge ("ALJ") improperly dismissed HEC's CCR-related discharge claim under Indiana Trial Rule 12(B)(6).

Based on these facts, HEC presented established legal authority that this "pump-and-dump" scheme violates several provisions of the CWA including the Act's technology-based standards. Those standards require technology-based permit limits for toxic pollutants to be based on the best available technology (BAT), even if those limits (as IDEM acknowledges) are more stringent than what water-quality-based standards require. IDEM Resp. Br. at 4 (citing 327 IAC 5-2-11). The existing RO system at Eagle Valley is such a technology. It is already in use at Eagle Valley and demonstrates that the coal ash contaminants—deemed "toxic pollutants" under the CWA—can be removed from the groundwater before it is funneled back into the combined waste stream that is discharged to the River. Thus, IDEM was required under the CWA to impose BAT-based technology limits on those toxic pollutants as close to zero as feasible, absent a showing that proper disposal of the RO waste stream is unachievable. *See* HEC Opening Br. at 26–30; *see also infra* 37-42. In short, this claim is a straightforward application of the Clean Water Act, regardless of whether the CCR Rule also has a role.

• **Antidegradation Claim.** HEC's antidegradation claim challenges IDEM's determination that no antidegradation demonstration was required when renewing the NPDES Permit for Eagle

Valley in 2023. This claim does not challenge IDEM's antidegradation decision from eight years ago in 2015. That 2015 decision was based on AESI's "estimates" and "projections" that Eagle Valley's pollutant discharges to the White River, including mercury, would decrease after the plant's conversion from coal to natural gas. Those projections later proved wrong. Effluent data submitted during the 2023 Permit renewal in this case showed mercury concentrations higher than AESI's earlier estimates. That new data prompted IDEM to include new mercury limits in the Permit at issue here. These facts are not in dispute. For that matter, they come directly from IDEM's own technical Factsheet, which provides the agency's rationale for issuing the 2023 NPDES Permit.[1] More importantly, these facts were pled in HEC's administrative pleading and must be taken as true under Trial Rule 12(B)(6). *See* HEC Opening Br. at 33.[2]

Under the Clean Water Act, any new or increased discharge of a regulated pollutant triggers antidegradation review if it results from a deliberate activity of the permittee, such as a change in operations. IDEM Resp. Br. at 23 (citing 327 IAC2-1.3-1(b)). Despite acknowledging that the new mercury limits were necessitated by AESI's operational changes, IDEM unlawfully declined to conduct the required review. Like the CCR-related discharge claim, this claim arises squarely under the CWA's NPDES permitting standards, regardless of whether the CCR Rule has any independent relevance. *See* HEC Opening Br. at 31–34; *see also infra* 42-44.

• **Mercury Claim.** HEC's mercury claim arises under the CWA's requirement that NPDES permits include effluent limits and monitoring requirements that assure compliance with applicable water-quality standards. Mercury is a bioaccumulative chemical of concern ("BCC"). And under the CWA, the water-quality criterion for a BCC like mercury applies at the point of discharge,

[1] Rec. Pt. 3: OALP000961 (Sec. 5.6 of IDEM's Factsheet discussing antidegradation).
[2] *See also* Rec. Pt. 6: OALP002078-79 (Amended Petition at ¶ 62 (quoting IDEM's Factsheet)).

without allowance for mixing or dilution. IDEM Resp. Br. at 27 (citing 327 IAC 5-2-11.1(b)(6)). The NPDES Permit limits—a daily maximum of 20 ng/L and a monthly average of 12 ng/L—together with a monitoring *infrequency* of only six grab samples per year—cannot mathematically assure compliance with the monthly average limit or water quality criterion of 12 ng/L. As IDEM admitted, if the one required grab sample taken every other month meets the daily maximum limit of 20 ng/L, it will violate the monthly average limit of 12 ng/L and the water quality criterion for mercury.[3] That admission is dispositive that the NPDES Permit violates the CWA. Like HEC's other claims, this claim is firmly rooted in the CWA not any provision of the CCR Rule. HEC Opening Br. at 55–62; *see also infra* at 44–49.

• **Cancer-Criteria Claim.** IDEM identified several carcinogens in Eagle Valley's discharges, including arsenic, beryllium, cadmium, and lead. Yet when conducting the required "reasonable potential to exceed (RPE)" analysis—an assessment done to determine whether a discharge of a specific pollutant has the potential to exceed any applicable water-quality standard and therefore requires a permit limit to assure the standard is met—IDEM evaluated the level of carcinogens in Eagle Valley's discharges only against numeric standards. It failed to assess those same carcinogens against Indiana's water quality standard designed to protect human health from cancer simply because the standard is expressed in narrative, rather than numeric form. These facts are not in dispute. They come from IDEM's Factsheet for the NPDES Permit and the agency's sworn admissions in discovery.[4]

[3] Rec. Pt. 3: OALP000873 (IDEM's Answer to Interrogatory 12)
[4] Rec. Pt. 3: OALP001003-04 (NPDES Permit Attachment 8); Rec. Pt. 5: OALP001843-44 (IDEM Answers to Requests to Admit 1-7); Rec. Pt. 3: OALP000870-71 (IDEM Answers to Interrogatories 5, 6 and 7).

These facts are dispositive that the NPDES Permit violates the CWA, which requires permitting authorities to consider all applicable water-quality standards—including narrative ones—when conducting the RPE analysis. And, where numeric values are lacking, IDEM must use one of several methods to interpret the narrative standard as part of the RPE analysis to determine if permit limits are necessary to meet the standard. IDEM did none of this, thereby failing to assure the NPDES Permit protects human health from cancer risk as the CWA requires. This claim is thus likewise grounded in the CWA, not the CCR Rule. HEC Opening Br. at 62-68; *see also infra* at 49-52.

In short, these are Clean Water Act claims, not an effort to impose CCR Rule requirements in Eagle Valley's NPDES Permit as the ALJ erroneously concluded and AESI and IDEM continue to suggest. The CCR Rule enters this case only because AESI made the NPDES Permit part of its corrective-measures plan for dealing with the groundwater polluted by Eagle Valley's coal ash ponds: AESI relies on Eagle Valley's production wells to "hydraulically control" or "capture" the coal-ash-contaminated groundwater before it reaches the White River and on the NPDES Permit to "contain" that water. HEC Opening Br. at 6-7. In short, AESI points to the NPDES Permit as a mechanism for compliance with the CCR Rule, which makes the Rule relevant here.

IDEM's own explanation of the CCR Rule confirms its relevance to this proceeding. IDEM acknowledges that the CCR Rule requires "that discharge from the CCR unit must be handled in accordance with the surface water requirements of the CWA." IDEM Resp. Br. at 13 (quoting 40 C.F.R. § 257.82(b), incorporating 40 C.F.R. § 257.3-3(a)). In other words, compliance with § 257.82(b) of the CCR Rule depends on compliance with the CWA. Therefore, if Eagle Valley's NPDES Permit violates the CWA, as HEC contends, then Eagle Valley's coal-ash discharges authorized by that unlawful Permit necessarily violate the CCR Rule as well. IDEM's claim that

AESI has complied with the CCR Rule because "IDEM properly issued the [NPDES] Permit . . . in compliance with applicable NPDES laws" merely underscores the point. IDEM Resp. Br. at 13. Of course, whether IDEM "complied with applicable NPDES laws" is for this Court to decide, not for IDEM to declare.

In any event, even if Respondents were correct that the CCR Rule has no bearing on this case, the ALJ's rulings still cannot stand. The ALJ dismissed or granted summary judgment on HEC's CWA claims despite well-pled allegations, undisputed evidence, and controlling law demonstrating that IDEM violated the CWA in issuing the NPDES Permit for Eagle Valley. HEC's pleading allegations, taken as true, made dismissal under Trial Rule 12(B)(6) premature, and the designated evidence either warranted summary judgment in HEC's favor or, at minimum, created a genuine fact issue precluding summary judgment under Trial Rule 56(C).

Moreover, the ALJ improperly granted summary judgment on the argument that HEC lacks associational standing. This conclusion, championed by AESI before OALP and again in its Response Brief, is incorrect as a matter of law and must be corrected.

As detailed in HEC's Opening Brief and further below, AESI and IDEM have not shown otherwise. Their arguments rest on mischaracterizations of HEC's claims and misstatements of the record and the governing law, including AOPA's newly amended standard for judicial review and established requirements for associational standing under AOPA. The Court should therefore set aside the ALJ's Final Order as arbitrary, capricious, contrary to law, and unsupported by a preponderance of the evidence.

ARGUMENT

I. AESI Misstates the Legal Standard Governing Judicial Review of Agency Action

AESI fundamentally misrepresents the law governing judicial review of administrative agency action. Although AESI correctly observes that the Court "does not act as the trier of fact"

and that its review is "confined to the agency record," AESI's further assertion that "Indiana law still requires the Court to defer to the agency's factual findings" is patently incorrect. AESI Resp. Br. at 8–9 (emphasis added).

The Indiana General Assembly eliminated judicial deference to administrative fact-finding when it amended the Administrative Orders and Procedures Act ("AOPA") in 2024. *See* 2024 Ind. H.E.A. 1003 § 12 (codified at Ind. Code § 4-21.5-5-11). The amendment strikes statutory language that previously prohibited a court from "substitut[ing] its judgment for that of the agency." *Id.* Instead, the new law unambiguously provides that "[a] court is not bound by a finding of fact made by the ultimate authority if the finding is not supported by the record[]" and "shall decide all questions of law... without deference to any previous interpretation made by the agency." *Id.* (emphasis added). This reform restored the judiciary's traditional, independent role in reviewing agency determinations—both legal and factual—and removed any presumption of correctness previously afforded to administrative findings of fact and conclusions of law. *See Ind. Office of Utility Consumer Counselor v. Duke Energy Indiana, LLC*, 248 N.E.3d 1205, 1210-11 (Ind. 2024) (observing that the General Assembly "[in 2024] enacted major administrative-law reforms declaring among other things, that a court must decide legal questions 'without deference' to interpretations by an AOPA agency" such that courts must determine whether an agency's interpretation is "right," not merely "reasonable").

Accordingly, while AESI is correct that a court's review of an agency action remains confined to the administrative record, that procedural limitation has nothing to do with a court's *deference* to an agency's factual or legal determinations. The amended AOPA makes clear that a reviewing court must independently determine, based on the record as a whole, and without deference to the agency's factual findings or legal conclusions, whether the agency's action is:

> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (2) contrary to constitutional right, power, privilege, or immunity;
>
> (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (4) without observance of procedure required by law; or
>
> (5) unsupported by *a preponderance of the evidence.*

Ind. Code § 4-21.5-5-14(d) (emphasis added). If the agency action fails this substantive standard of review, the Court must set it aside. Ind. Code § 4-21.5-5-15.

These legislative changes to AOPA render AESI's authorities outdated. Specifically, AESI's reliance on *Ind. Dep't of Env't Mgmt. v. Conard*, 614 N.E.2d 916 (Ind. 1993), and other pre-2024 cases interpreting AOPA's former "substantial evidence" standard is misplaced. AESI Resp. Br. at 8-10. Those cases preceded the 2024 amendments to AOPA, which now require agency findings to be supported by a *preponderance of the evidence,* which is a higher evidentiary burden.[5] Ind. Code § 4-21.5-5-14(d)(5).

Despite this statutory directive, AESI continues to rely on the repealed "substantial evidence" standard, even quoting outdated statutory language to claim that HEC is entitled to relief only if IDEM's action is "unsupported by substantial evidence." AESI Resp. Br. at 10. That assertion is inaccurate and misleads the Court about the controlling standard of review. Under AOPA as amended, this Court owes *no deference* to IDEM or the OALP's factual findings or legal conclusions and must independently determine whether the ALJ's three rulings against HEC were arbitrary, capricious, an abuse of discretion, contrary to law, or unsupported by *a preponderance of the evidence*.

---

[5] *Ind. High Sch. Athletic Ass'n, Inc. v. Watson,* 938 N.E.2d 672, 680–81 (Ind. 2010) (observing that "substantial evidence" is "more than a scintilla" but "need not reach the level of preponderance"); *M.Y. v. State Dep't of Child Servs. (In re K.Y.),* 145 N.E.3d 854, 859 (Ind. Ct. App. 2020) (a "preponderance of the evidence" is "the greater weight of the evidence.").

IDEM's response underscores this point. While AESI misstates the standard, IDEM correctly acknowledges that the reviewing court "is not bound by any finding of fact made by the agency if the finding is not supported by a preponderance of evidence in the record." IDEM Resp. Br. at 9 (citing Ind. Code § 4-21.5-4-11(a)). But even IDEM slightly misstates the provision it cites. The statute provides that "[a] court is not bound by a finding of fact made by the ultimate authority if the finding of fact is not supported by the record." Ind. Code § 4-21.5-5-11(a) (emphasis added). This distinction matters. On judicial review, the "ultimate authority" of IDEM is the OALP, not IDEM itself. It is the Final Order issued by the OALP that is the subject of this Court's review. Accordingly, the proper inquiry is whether the factual findings of the ALJ, acting on behalf of the former OEA and the OALP, are supported by a preponderance of evidence in the record. They are not.

Accordingly, AESI's portrayal of the legal standard is wrong. AOPA requires this Court to conduct an independent, non-deferential review of the ALJ's rulings. Applying that standard here, the OALP's Final Order cannot stand. As detailed in HEC's Opening Brief and further below, each of the ALJ's dispositive rulings fails every part of that test.

II. AESI's "Factual Background" Section is Misleading and Unsupported

AESI's misstatements extend beyond its inapposite discussion of an outdated legal standard review. It also presents a factual narrative that is not supported by the record. For instance, AESI begins by portraying itself as an "environmentally responsible" operator and claiming that it "treated" coal-ash waste as part of disposal in its unlined ash ponds. AESI Resp. Br. at 10. AESI cites no record evidence to support its self-characterization, because none exists. And IDEM confirms that Eagle Valley's ash ponds are not part of any sort of *treatment* system but merely "a method of disposal for coal ash." IDEM Resp. Br. at 4 n.4 (emphasis added).

AESI's use of the term "raw" to describe the coal ash contaminated groundwater it uses as process and cooling water at Eagle Valley is likewise misleading. AESI Resp. Br. at 10–11. The phrase "raw groundwater" appears nowhere in the NPDES Permit, IDEM's Factsheet for the NPDES Permit, or any supporting technical document. Nor does the term "raw groundwater" appear anywhere in the CWA or RCRA, including RCRA's CCR Rule.[6] It is a post-hoc invention, coined by AESI's litigation counsel to obscure the fact that the groundwater is contaminated with coal ash waste, and to evade the NPDES permitting requirements that apply once that groundwater is treated by Eagle Valley's RO system to remove the toxic coal ash pollutants. HEC Opening Br. at 29–30; AESI Resp. Br. at 35; *see also infra* at 37–42.

Beyond these examples—and others discussed where relevant below—AESI's fact statement is replete with legal argument masquerading as facts. For example, AESI declares that "*[a]s required by Indiana law,* the Permit contains both maximum daily and average monthly effluent limitations"; that "IDEM calculated all the effluent limitations … *in line with Indiana law* . . ."; "IDEM conducted the detailed calculation analysis *required by Indiana law and the CWA* to apply limits on contaminants that may be discharged into the White River"; and that "the Permit does *exactly what the law requires*." AESI Resp. Br. 12-13 (emphasis added). IDEM likewise pronounces that it imposed NPDES Permit limits "in accordance with 327 IAC 5-2-11." IDEM Resp. Br. at 4. These are not facts; they are contested legal conclusions on the core question before the Court; that is, whether IDEM issued a NPDES Permit for Eagle Valley that complies with the law. Presented as "fact," these legal assertions improperly conflate advocacy with evidence.

[6] HEC's counsel performed a comprehensive search on LexisNexis across the full text of the Clean Water Act (33 U.S.C. §§ 1251–1389), the Resource Conservation and Recovery Act (42 U.S.C. §§ 6901–6992k), EPA's implementing regulations in 40 C.F.R. Parts 122–125 and 257–261 (including the CCR Rule, 40 C.F.R. Part 257, Subpart D), and Indiana's NPDES regulations (327 IAC 5). That search produced no occurrence of the term "raw groundwater."

In sum, AESI's "Factual Background" is not factual at all. Its narrative distorts or omits key evidence and replaces it with counsel's characterizations, invented terms, and legal conclusions cast as fact. The Court should therefore treat AESI's factual assertions with caution and instead rely on the administrative record, which is accurately presented in detail on pages 4–13 of HEC's Opening Brief.

III. AESI Misstates the Law, Evidence, and The ALJ's Holding on the Issue of Associational Standing

AESI's assertion that HEC lacks associational standing fails because it ignores the controlling law and record evidence. Tellingly, IDEM declined to join AESI's arguments on standing. IDEM Resp. Br. at 8. And the ALJ, who adopted AESI's other positions, did not base her associational standing ruling on AESI's argument that HEC has no "voting members" under Indiana's nonprofit corporation statute. AESI Resp. Br. at 16–20.[7]

In any event, AESI's standing arguments are unavailing for at least five reasons. *First,* it is well-established that organizations need not have "voting members" under state corporation law to have associational standing. Courts – including the U.S. Supreme Court in 2023 – routinely reject arguments otherwise on the basis that linking an organization's model of corporate governance to associational standing such would "exalt form over substance." *Second,* standing under AOPA plainly does not require proof of injury; the standard is whether a petitioner is "aggrieved or adversely affected," and AESI's claim that HEC's members must show a particularized injury is incorrect and relies on inapposite case law. *Third,* AESI incorrectly states that HEC's members are claiming a generalized public concern, when instead the members are asserting credible individual concerns about the health effects of exposure to pollution where they

[7] Rec. Pt. 1: OALP000006-000007 (OALP Final Ruling at 6-7).

live and work, which plainly satisfies AOPA's standard. *Fourth,* in any event, AESI (and the ALJ, adopting AESI's theories) improperly cherry-picks evidence from the record, ignoring undisputed record evidence demonstrating the HEC members' credible concerns about pollution exposure from Eagle Valley. *And finally,* the Court should see through AESI and IDEM's groundless and irrelevant procedural arguments regarding the ALJ's rejection of HEC's cross-motion for summary judgment on standing. Regardless of why or how the ALJ denied HEC's cross-motion, the erroneous outcome is the same.

Under the governing AOPA standard, the undisputed facts confirm that HEC satisfies all three elements of associational standing under *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977), *superseded by statute on other grounds*, as adopted in *Save the Valley, Inc. v. Indiana-Kentucky Electric Corp.*, 820 N.E.2d 677 (Ind. Ct. App. 2005). AESI's contrary arguments—all grounded in misstatements of fact and law—should be rejected by the Court. And the ALJ's unlawful ruling that adopted them should likewise be reversed.

A. AESI's Argument that Associational Standing Depends on a Corporate Model of Governance With "Voting Members" is Meritless

AESI has revived its argument from the proceeding below that, to establish associational standing, HEC must have "voting members" as defined by Indiana's nonprofit corporation law. AESI Resp. Br. at 17–18. Even the ALJ who adopted nearly all of AESI's other arguments declined to rely on this one.[8] She was right to do so: the argument is wholly untethered from applicable law. Yet AESI now goes a step further, falsely asserting that HEC "conceded" the issue by not addressing it in its Opening Brief. AESI Resp. Br. at 20. That assertion is specious. HEC did not address the argument because the ALJ did not base her ruling on it; there was nothing to address.

[8] Rec. Pt. 1: OALP000006-000007 (OALP Final Ruling at 6-7).

In any event, AESI's "voting members" theory fails on the merits. It finds no support in Indiana law, has been expressly rejected in prior environmental cases, and ignores controlling precedent from both Indiana courts and the U.S. Supreme Court.

The undisputed facts are straightforward. HEC is organized as a directorship under the Indiana Non-Profit Corporation Act, Ind. Code § 23-17 *et seq*.[9] Its Articles of Incorporation make clear that HEC does not have "voting members" for purposes of corporate governance as defined by Ind. Code § 23-17-2-17(a).[10] But HEC's Bylaws—consistent with Ind. Code §§ 23-17-7-4 and -11-3(a)[11]—create a class of "non-voting members" defined as persons who donate to and support HEC's mission.[12] And HEC's Bylaws expressly incorporate the three *Hunt* criteria for associational standing stating that HEC shall have standing to bring suit on behalf of its non-voting members when: "(1) its members would otherwise have standing to sue in their own right; (2) the member(s)' interests [HEC] seeks to protect are germane to HEC's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."[13] *See Hunt,* 432 U.S. at 343. Thus, contrary to AESI's assertions, HEC has members; they simply have no formal role or responsibility in managing or directing HEC's operations.

The U.S. Supreme Court in *Hunt* rejected the very premise underlying AESI's argument; that associational standing depends on a model of corporate governance by members. *See id*. Indeed, the Court held that the Washington Apple Advertising Commission, although a state

---

[9] Rec. Pt. 2: OALP000736.

[10] HEC's non-voting members were established as a class of membership when HEC transitioned from a member-managed to a board-managed corporate structure. That change in organizational governance is expressly permitted by Indiana's nonprofit law. *See* Ind. Code §§ 23-17-7-4 and -11-3(a).

[11] Allowing a non-profit corporation to use its bylaws to establish classes of members with no voting rights.

[12] Rec. Pt. 2: OALP000731; OALP000750-00051.

[13] Rec. Pt. 2: OALP000731; OALP000750-00051.

government agency, had associational standing to represent the state's apple growers and dealers because the Commission performed the functions of a traditional trade association by providing a way for growers and dealers to express their collective views and protect their collective interests. *Id.* at 344–45. The Supreme Court emphasized that although the apple growers and dealers were not members of the Commission under corporation law, they possessed "all of the indicia of membership" necessary to confer associational standing on the Commission, cautioning that to hold otherwise would impermissibly "exalt form over substance[.]" *Id.* at 345.

Indiana courts have followed that same principle. In *Save the Valley,* the Indiana Court of Appeals adopted *Hunt* and recognized that associational standing exists to promote judicial economy, allow individuals to pool their resources, and protect citizens who band together to further their collective interests. 820 N.E.2d at 680–82. Contrary to AESI's suggestion, nothing in *Save the Valley* suggests the appeals court even considered the petitioning organizations' corporate structure or the voting status of their members as necessary to demonstrate associational standing. AESI Resp. Br. at 19. Rather, the decision in *Save the Valley* confirms that associational standing turns on citizens joining an organization to represent their collective interests in furthering a cause, not on the technical details of an organization's internal governance. 820 N.E.2d at 680-81.

The U.S. Supreme Court recently extended its *Hunt* analysis to clarify the membership requirement for associational standing in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181, 200–201 (2023). There, the Court affirmed that a nonprofit organization need not have "genuine membership" under state corporate law to invoke associational standing. *Id.* Furthermore, the Court explained that an organization may represent individuals who voluntarily join and support the organization's mission, and when it does so in good faith, "no further scrutiny into how the organization operates" is required. *Id.* at 201. Indiana

has adopted *Hunt* as the standard for associational standing, and the U.S. Supreme Court's detailed analysis of *Hunt* in *Students for Fair Admissions* should govern Indiana courts' associational standing analysis as well.

Courts across the country have similarly followed *Hunt* in rejecting attempts to tie associational standing to corporate law formalities.[14] *See Friends of the Earth v. Chevron Chem. Co.,* 129 F.3d 826, 828 (5th Cir. 1997) (organization could assert associational standing in the absence of legal members under applicable corporation law where members voluntarily associated with the organization and the lawsuit clearly fell within the organization's central purpose and the scope of reasons individuals joined the organization); *Quad Cities Waterkeeper v. Ballegeer,* 84 F. Supp. 3d 848, 859–60 (C.D. Ill. 2015) (even though nonprofit organization's bylaws indicated that it had no legal members, the nonprofit had organizational standing to sue on behalf of its members who voluntarily associated with and contributed to the organization as a means of expressing and protecting their collective interests); *Citizens Coal Council v. Matt Canestrale Contracting, Inc.*, 40 F. Supp. 3d 632, 637–42 (W.D. Pa. 2014) (nonprofit had associational standing to sue on behalf of its non-voting members because they had voluntarily affiliated with the organization for the specific purpose of filing the lawsuit and paid annual dues of $10.00); *U.S. Public Interest Research Group v. Bayou Steel, Inc.,* 1997 U.S. Dist. LEXIS 24551 (E.D. La. Sept. 15, 1997) (even though a nonprofit's articles of incorporation provided that the organization shall have no members, the court found associational standing existed because the organization consistently treated all contributors as members, and provided them with a means of expressing their collective views and protecting their collective interests in environmental issues).

[14] *See, e.g.*, Rec. Pt. 1: OALP000135-000138.

Despite this established precedent, AESI's counsel advanced the same attack on HEC's associational standing in a previous administrative appeal in which HEC was the petitioner. *See Objection to the Issuance of Closure/Post Closure Plan Re: Tanners Creek Fly Ash Pond, Tanners Creek Development LLC*, 2023 OEA 027, OEA Cause No. 20-S-J-5107. In that case, the former Office of Environmental Adjudication ("OEA") squarely rejected AESI's same proposal to "construe[] Indiana's Nonprofit Corporation law to use membership form to defeat [HEC's] associational standing," concluding that doing so would "exalt form over substance" contrary to the Supreme Court's decision in *Hunt*. 2023 OEA 027 at *058.

The former OEA examined the same body of authority, including *Save the Valley* and national cases applying *Hunt,* and confirmed that HEC's associational standing does not depend on whether its members are "voting members" for purposes of corporate governance. *Id.* at *054–58. The former OEA considered HEC's same Bylaws that AESI relies on in this case and concluded that HEC's non-voting members have the requisite "indicia of membership" because they voluntarily donate to and associate with HEC to promote its mission and use HEC as the vehicle to express and protect their collective interests. *Id.* at *057–058. The OEA therefore held that HEC could represent its donating members even though they were not "voting members" under state corporate law. *Id.* There is no sound reason for a different result here.

Even so, AESI's attorneys persist in their unfounded claim that "whether HEC can achieve associational standing through its peculiar corporate structure remains a significant question of law." AESI Resp. Br. at 19. It is not. Shortly after the OEA issued its 2023 ruling in *Tanners Creek*, the U.S. Supreme Court resolved this very question once and for all in *Students for Fair Admissions*, setting the record straight that a nonprofit organization does not have to have "genuine members" under state corporate law to invoke associational standing. 600 U.S. at 200-201. So long

as the nonprofit is, in good faith, representing individuals who voluntarily join and support the organization's mission, no "further scrutiny" into the membership structure is required. *Id.* AESI's attempt to sidestep the overwhelming precedent on this issue, despite HEC having cited it repeatedly below,[15] should be rejected.

In sum, AESI's "voting members" theory has been rejected at every level of authority—from Indiana's own environmental tribunal in *Tanners Creek*, to the Indiana Court of Appeals in *Save the Valley*, to the U.S. Supreme Court in *Students for Fair Admissions*. AESI's persistence in advancing this groundless argument, already discredited under identical facts, underscores the frivolous nature of AESI's position, which should be rejected by this Court.

B. AOPA Standing Does Not Require Proof of Injury

The ALJ plainly erred when she concluded that HEC lacks associational standing because its members who live in Martinsville "have suffered no injuries."[16] On its face, that ruling is contrary to the unambiguous language of AOPA, which requires only that a petitioner be "aggrieved or adversely affected" by an agency action. Ind. Code § 4-21.5-3-7(a)(1)(B). Nowhere does the term "injury" appear in the statute. And the Indiana Supreme Court has confirmed that AOPA standing does not require proof of injury. *See Huffman v. Office of Environmental Adjudication*, 811 N.E.2d 806, 812 (Ind. 2004).

In response to HEC's arguments rooted in the well-established law on this point, AESI improperly conflates AOPA standing with the judicial doctrine of standing. For example, AESI's subheading B announces that "HEC's Affiants Cannot Demonstrate *Concrete Injury* and Are Not *Adversely Affected* by the Permit." AESI Resp. Br. at 20 (emphasis added). But the phrase

[15] Rec. Pt. 1: OALP000137–000138; Rec. Pt. 3: OALP000846-000847.
[16] Rec. Pt. 1: OALP000006-07 (OALP Final Order at 6-7).

"concrete injury" comes from judicial-standing jurisprudence and has no place in an AOPA proceeding. AOPA's plain text and Indiana Supreme Court precedent make clear that AOPA requires only that a petitioner be "aggrieved or adversely affected"—no "concrete injury" is required. *Huffman*, 811 N.E.2d at 812 (explaining that, if the legislature had wanted to codify the judicial doctrine of standing, it "would have used phrases like 'personal stake' or 'direct injury'" when drafting AOPA's standing provision but "did not").[17]

AESI also selectively quotes from HEC members' affidavits out of context to claim that "the evidence shows these individuals have not suffered *any injury,* let alone one sufficient to establish standing in their own right as a prerequisite to HEC's associational standing." AESI Resp. Br. at 25 (emphasis added). In support, AESI cites *Solarize Indiana, Inc. v. Southern Indiana Gas & Electric Co.*, 182 N.E.3d 212, 217 (Ind. 2022)—a non-AOPA utility rate case that itself relies on another non-AOPA zoning case, *Board of Commissioners of Union County v. McGuinness*, 80 N.E.3d 164, 168 (Ind. 2017). Even AESI acknowledges that these cases apply the "common-law standing rule" requiring a plaintiff to show "direct injury" from the challenged conduct. AESI Resp. Br. at 25. But again, this is not a zoning case or a utility rate case, and AOPA does not incorporate the common-law, judicial standing rule, as the Indiana Supreme Court made clear in *Huffman*.

AESI next disagrees with HEC that the Indiana Supreme Court in *Huffman* held that AOPA standing can be satisfied based on "potential health risks" from polluting activities approved by IDEM. AESI Resp. Br. 20–21. But that is precisely the holding in *Huffman*. Much like HEC's

[17] AESI repeats the same conflation throughout its brief. On the very same page, AESI acknowledges AOPA's "aggrieved or adversely affected" standard but then concludes that "the individuals HEC relies on here to *establish an injury* are not adversely affected by the Permit," AESI Resp. Br. at 20 (emphasis added), again substituting the judicial-standing concept of "injury" for AOPA's "adversely affected" standard.

members, the petitioner in *Huffman* sought administrative review of an IDEM-issued NPDES permit due to her concerns of "health risks" from potential exposure to pollutants in the permitted discharge because she managed and frequently visited property near the discharge. 811 N.E.2d at 808-809, 815. The *Huffman* court held that those pleading allegations, *if true*, satisfied AOPA's "aggrieved or adversely affected" standard. *Id.* at 815.

Nevertheless, AESI argues that this ruling does not apply because *Huffman* was a "procedural, not substantive" decision. AESI Resp. Br. at 21. It is true that the Supreme Court in *Huffman* reversed the former OEA's dismissal at the pleading stage as "premature" because it deprived the parties of "an opportunity to provide additional evidence or to develop the argument [on standing] more fully." AESI Resp. Br. at 21 (quoting *Huffman*). But that procedural posture does not diminish the substance of the Court's ruling. Applying the standard for a motion to dismiss under Trial Rule 12(B)(6), the Court explained that the petitioner's factual allegations of potential health risks must be accepted as true and, if later proven with evidence, were sufficient to establish that she was "aggrieved or adversely affected" under AOPA. *Huffman*, 811 N.E.2d at 215. In other words, the *Huffman* Court made clear that evidence-based concerns about health risks from an IDEM-approved discharge, not proof of personal injury, are sufficient to satisfy AOPA's standing requirement. AESI's suggestion otherwise is wrong.

AESI's attempt to sideline *Save the Valley* fares no better. AESI asserts that *Save the Valley* is irrelevant because the parties in that case "did not appear to dispute that the named members are aggrieved or adversely affected." AESI Resp. Br. at 22. But that ignores what the Court of Appeals said, and agreed with, about the parties' position. The court recognized that the organizational petitioners had alleged their members "reside, work, and recreate in the area affected by the [IDEM-permitted] landfill" and that those members "would be adversely affected by the impact

on the groundwater and by fugitive dust from the landfill." *Save the Valley*, 820 N.E.2d at 682. Accepting those allegations *as true*, the court agreed that the members were "aggrieved or adversely affected" within the meaning of AOPA. *Id.* In other words, *Save the Valley*, like *Huffman*, confirms that evidence of potential health risks to persons who live, work, and recreate near the affected area are sufficient to establish standing under AOPA; no proof of personal injury is required contrary to AESI's argument and the ALJ's ruling.

The holdings in *Huffman* and *Save the Valley* not only foreclose AESI's standing arguments and reveal the ALJ's error, but they have long guided Indiana's administrative practice. For nearly two decades after those decisions, the former Office of Environmental Adjudication ("OEA") consistently applied them to find standing where petitioners presented the same type of evidence HEC's members have presented here—fact-based concerns about pollution exposure and environmental effects near where they live and work. *See, e.g.*, *Tanners Creek*, 2023 OEA 027, at *034, *058 n.9; *Objection to the Issuance of CFO Approval, Natural Prairie Indiana Farmland Holdings, LLC*, OEA Cause No. 19-WJ-5045, Findings of Fact, Conclusions of Law, and Order at 3, 8 (Jan. 28, 2020);[18] *Objection to the Issuance of NSR/PSF/Part 70 Operating Permit to Auburn Nuggett, LLC*, 2005 OEA 47, *53. In each instance, the OEA held that residents who live, work, or recreate near IDEM-permitted facilities and face potential health risks from pollution exposure are "aggrieved or adversely affected" under AOPA. *See HEC's Opening Br.* at 48 (further discussing these cases). The OEA repeatedly reached that conclusion without proof of "injury" and without regard to whether others not named in the proceeding may be similarly at risk.

In sum, *Huffman* and *Save the Valley* preclude AESI's argument that AOPA standing requires proof of injury. It does not. Both decisions, and the consistent OEA precedent applying

[18] Rec. Pt. 2: OALP000511 (OEA's Decision in Natural Prairie).

them, confirm that evidence of health risks from IDEM-permitted activities is sufficient to demonstrate that a petitioner is "aggrieved or adversely affected" under AOPA. The ALJ's conclusion that HEC lacks standing because its members "have not suffered injuries" has no foundation in the law and should be reversed by this Court.

C. HEC Members Are Not Claiming "Generalized, Public Concerns"

AESI is correct that the "Indiana Supreme Court in *Huffman* stated that 'AOPA does not allow for administrative review based on a generalized concern as a member of the public.'" AESI Resp. Br. at 21 (quoting *Huffman* at 811 N.E.2d at 812). But AESI omits what the Court said next. The *Huffman* court squarely held that evidence of health risks from an IDEM-permitted activity is sufficient to establish that a petitioner is "aggrieved or adversely affected" under AOPA. *Id.* at 815. In other words, while generalized public concerns are not enough, credible concerns about the health effects of exposure to pollution where one lives or works satisfies AOPA's standard. And that is precisely the showing HEC's members have made here. *See* HEC Opening Br. at 37–44.

Ignoring this evidence, AESI instead cobbles together fragments from page 46 of HEC's Opening Brief to suggest that HEC has agreed its members' "concerns are the same as every citizen in Martinsville.'" AESI Resp. Br. at 21. That is not what HEC said. HEC's full statement that AESI selectively parses out of context was directed at the illogical outcome of the ALJ's ruling; that is, if everyone in Martinsville were to face health risks from Eagle Valley's discharges, then no one in town would have standing to do anything about it. That result, as HEC explained, is "absurd (and unjust)" because it would mean that when a single facility's pollution and the resulting threat of harm extend broadly across a community, AOPA standing is eliminated rather than established. HEC Opening Br. at 46. HEC never said that its members' concerns are the same as all other City residents. Instead, HEC presented undisputed evidence that its members' concerns are specific to

their circumstances, rooted in where they live, their use of the White River, and the health risks they face from Eagle Valley's toxic discharges. *See* HEC Opening Br. at 37–44. While there may be other people in the community similarly at risk, that does not transform HEC members' individualized concerns into general ones.[19]

In short, *Huffman* draws a clear line between generalized public concern and the specific health threats faced by individuals affected by IDEM-permitted pollution. *Save the Valley* reinforces that distinction. HEC's members fall on the latter side of that line. Their affidavits and expert evidence show that they live and recreate near Eagle Valley, rely on the same watershed for drinking water, and reasonably fear exposure to coal-ash contaminants being discharged into the White River. Those are not abstract or generalized public concerns; they are precisely the kind of impacts that make a petitioner "aggrieved or adversely affected" under AOPA.

D. AESI's Selective Reading of the Record, Adopted by the ALJ, Violates Trial Rule 56

Regardless of whether the Court applies the correct "aggrieved or adversely affected" standard or the inapplicable "concrete injury" standard, AESI's limited portrayal of the evidence violates a fundamental rule of summary judgment: the designated evidence must be viewed in the light most favorable to the non-moving party. *See* Ind. Trial Rule 56(C); *Durakool, Inc. v. Mercury Displacements Indus., Inc.*, 422 N.E.2d 680, 682 (Ind. Ct. App. 1981) (in determining whether a

[19] AESI attempts to downplay its prior reliance on *Robertson v. Board of Zoning Appeals*, 699 N.E.2d 310 (Ind. Ct. App. 1998) for this same argument, because "the ALJ did not cite to or rely on *Robertson*." AESI Resp. Br. at 22. But as HEC explained in its Opening Brief (pages 46-47), AESI invoked *Robertson* below to argue that HEC's members are not aggrieved or adversely affected because they are claiming only a "general injury sustained by the community as a whole." Rec. Pt. 2: OALP000611 (AESI SJ Brief at 7). The ALJ relied on AESI's *Robertson* argument. Rec. Pt. 1: OALP000007 (OALP Final Order at 7) even though the Indiana Court of Appeals in *Save the Valley* expressly rejected *Robertson*'s application to AOPA and the doctrine of associational standing. 820 N.E.2d at 681-82. AESI's prior reliance on *Robertson* to support an argument the ALJ adopted is thus relevant to demonstrate the ALJ's legal error in doing so.

genuine fact issue exists, "any doubt must be resolved against the movant[]" and evidentiary matters must be "construed in a light most favorable to the nonmoving party."); *English Coal Co. v. Durcholz*, 422 N.E.2d 302, 307 (Ind. Ct. App. 1981) ("[s]ummary judgment is not an appropriate means of resolving questions of credibility of evidence or its weight, or even conflicting inferences which may be drawn from undisputed facts[,]" such that even if a court believes the nonmoving party will not likely prevail "it would not be authorized to grant summary judgment").

As detailed in HEC's Opening Brief, the ALJ adopted AESI's constrained view of the evidence, contrary to Indiana's established summary judgment standard, by ignoring the record evidence establishing that HEC's members are "aggrieved or adversely affected." HEC Opening Br. at 34–44. Instead of addressing this, AESI's Response doubles down on the same selective reading of the record, under the same inapplicable law of judicial standing, without addressing HEC's arguments or the evidence the ALJ ignored. For example, AESI cherry-picks a single sentence from each of the Radues' detailed, four-page affidavits and compares it to a single sentence from their lengthy discovery answers to claim they are not harmed because they still recreate at a local park. AESI Resp. Br. at 24–25. This is the same narrow view of the evidence adopted by the ALJ to find the Radues are not harmed because their "activities around the White River have not changed as a result of the Permit."[20]

But this selective parsing of two sentences from nearly 100 pages of undisputed testimony and evidence ignores the substance and full context of what the Radues said. Their sworn affidavits explain that they and their grandchildren previously waded and played in Burkhart Creek—activities they would no longer engage in out of concern for exposure to coal-ash contamination from Eagle Valley:

[20] Rec. Pt. 1: OALP000007 (OALP Final Order at 7).

> Anna Radue: "[W]hen our grandchildren are in town, we like to take them to the Park, where they enjoy wading and playing in Burkhart Creek. Because IDEM is allowing Eagle Valley to pollute the White River with continuous discharges of coal ash contaminants, and those contaminants will flow downstream to Burkhart Creek, my husband and I will no longer take our grandchildren there, nor will we continue to recreate, hike, or view wildlife there ourselves."[21]
>
> Rober Radue: "When our grandchildren are in town, we like to take them to the Park, where they enjoy wading and playing in Burkhart Creek. Because IDEM has allowed Eagle Valley to continuously discharge coal ash contaminants to the West Fork of the White River that flows downstream to Burkhart Creek, my wife and I will no longer take our grandchildren there or recreate, hike, or view wildlife there ourselves."[22]

In their discovery answers, the Radues reiterated this same concern about how the fear of exposure to coal ash contaminants from Eagle Valley has diminished their use and enjoyment of Burkhart Creek County Park, including avoiding contact with the creek:

> Anna Radue: "I do not enter or swim in the creek although others visiting do. I do not let my grandchildren enter the creek waters out of concern that they could be exposed to coal ash contaminants in the water from Eagle Valley."[23]
>
> Roger Radue: "While we always visit the creek and small ground water pools, we now do not intentionally enter the water due to our concerns regarding its contamination. . . . And it has changed the way we interact with our environment as we no longer will visit Burkhart Creek or bring our grandchildren there."[24]

See also HEC Opening Br. at 39–41 (quoting the full text of the Radues' discovery answers).

These statements are entirely consistent. Both accounts reflect the same underlying fact: the Radues have changed how they use and enjoy the park because of their concerns about coal-ash contamination. They no longer allow their grandchildren to wade or play in the creek and limit their own activities to avoid contact with the water. Construed in HEC's favor as Trial Rule 56 requires, this evidence demonstrates the Radues' individualized concern about pollution

[21] Rec. Pt. 2: OALP000492.
[22] Rec. Pt. 2: OALP000496.
[23] Rec. Pt. 3: OALP000791–793.
[24] Rec. Pt. 3: OALP000800–803.

exposure—precisely the required showing to establish that a person is "aggrieved or adversely affected" under AOPA.

AESI similarly picks and chooses from the record in its discussion of the City of Martinsville's 2021 Water Quality Report, insisting that the Report proves the community's drinking-water supply "is safe." AESI Resp. Br. at 24.[25] But as HEC explained in its Opening Brief (pp. 41–42), that argument is misleading and incomplete. The water utility does not test for many of the toxic coal-ash contaminants discharged from Eagle Valley, such as hexavalent chromium, one of the most hazardous of those pollutants, so the report's silence on those contaminants cannot be taken as proof of safety. HEC Opening Br. 41–42.

For that matter, HEC member David McSwane, a public health scholar who taught environmental science and public health for decades at Indiana University's School of Public and Environmental Affairs, School of Medicine, and Richard M. Fairbanks School of Public Health, testified to that very point in his affidavit.[26] He explained that the absence of testing for coal-ash pollutants in Martinsville's water system underscores, rather than alleviates, concern about exposure risks for residents who rely on that water:

> 5. When I learned that IDEM issued a permit that allows Eagle Valley to continuously discharge coal ash contaminants from its coal ash waste ponds to the West Fork of the White River, I became concerned.
>
> 6. I am concerned about these discharges because I know that coal ash contains dangerous contaminants, including carcinogens like hexavalent chromium and arsenic, as well as heavy metals like lead, that do not biodegrade and these contaminants may end up in my drinking water.
>
> 7. I live in the City of Martinsville, which draws its source of drinking water from the White River and surrounding aquifer. I rely on that water in my home to drink, bathe, and use on a daily basis.

[25] *See also* Rec. Pt. 2: OALP000609 (AESI Summary Judgment Brief at 5).
[26] Rec. Pt. 2: OALP000499.

> 8. Every year, I review the report provided by the City's water utility to understand whether the utility is complying with the Safe Drinking Water Act and what chemicals are present in my water. ***Based on these annual reports, I understand that Martinsville's drinking water has had issues with contaminants in the past and that the utility does not treat for hexavalent chromium. Because hexavalent chromium is a carcinogen and does not biodegrade, I am concerned that my drinking water will be unsafe*** for me and my wife . . . to drink and use.[27]

David McSwane's unrebutted testimony undercuts AESI's claim that the Water Quality Report proves the community's drinking water is safe. Rather, it shows that the water utility's limited testing omits the very coal ash contaminants most likely to pose long-term health risks from Eagle Valley's discharges. Yet, contrary to Trial Rule 56, the ALJ ignored this testimony, and AESI's Response Brief does the same, recycling the same flawed argument about the Water Quality Report while failing to address the evidence that undermines it.[28]

In any event, AOPA standing does not require HEC's members to prove the NPDES Permit "will make their drinking water unsafe" or that they "have suffered any ill health effects" as AESI continues to insist. AESI Resp. Br. at 24 (emphasis added). Requiring such proof would place an impossible evidentiary burden on Hoosiers seeking to challenge IDEM decisions that affect where they live. Indeed, a petitioner gets only fifteen days to seek administrative review of an IDEM

---

[27] Rec. Pt. 2: OALP000499 (emphasis added).

[28] AESI challenges HEC's reliance on affidavits of HEC employee Dr. Indra Frank (a physician and environmental health specialist), Rec. Pt. 2: OALP000505, and HEC consultant Mark Hutson, P.G. (a licensed geologist with more than four decades of experience in hydrogeology, contaminated-site investigation and remediation), Rec. Pt. 2: OALP000501. It is true that these witnesses were not formally disclosed during expert discovery, in part because it was not apparent at the time that standing was at issue. However, the affidavits of Dr. Frank and Mr. Hutson should come as no surprise to AESI. The affidavits were attached as exhibits to HEC's Amended Petition for Administrative Review (Rec. Pt. 2: OALP000501-000510); identified in HEC's Preliminary Witness and Exhibit Lists (*see* AESI Resp. Br. 27); disclosed in HEC's discovery responses (Rec. Pt. 3: OALP000774-778); listed on AESI's Preliminary Witness and Exhibit List; and designated by AESI as exhibits in support of its own motion for summary judgment (Rec. Pt. 2: OALP000637). The ALJ did not indicate that she was excluding this record evidence, nor would she have had a valid reason to do so.

decision after being served with notice of the decision. *See* Ind. Code § 13-15-6-1. Given that short window, it would be all but impossible for any person to have the necessary proof of illness to seek administrative review. As explained by Anna Radue, an environmental professional with advanced degrees in microbiology, environmental science, and public affairs: although she is "not aware that [she has] any health issues from exposure to Eagle Valley's coal ash contamination of the White River, such as rare cancers, these may take many years to develop."[29]

Nothing in AOPA requires a petitioner to wait until they get sick and then prove the illness was caused by IDEM's action before being able to challenge it. To hold otherwise, as the ALJ did here, runs counter to the very purpose of environmental permitting, which is to protect human health and the environment so that injury and illness does not occur. *See* Ind. Code § 13-12-3-1(3). AESI fails to confront this fundamental legal flaw in the ALJ's ruling (fully presented in HEC's Opening Brief) by conflating the injury requirement of judicial standing with AOPA's standard to justify the ALJ's wholesale disregard of relevant evidence.

Viewed in the light most favorable to HEC as Trial Rule 56 requires, the evidence demonstrates that HEC's members have credible, individualized concerns about pollution exposure and health risks—concerns that make them "aggrieved or adversely affected" under AOPA. The ALJ's ruling otherwise was clear error that should be reversed by this Court.

E. Whether the ALJ "Struck" or "Denied" HEC's Cross-Motion for Summary Judgment on Associational Standing, the Erroneous Outcome is the Same

IDEM takes issue with HEC's characterization of the ALJ "striking" HEC's cross-motion for summary judgment on associational standing and supporting brief, which was consolidated with HEC's brief in opposition to AESI and IDEM's motions for summary judgment. IDEM Resp.

[29] Rec. Pt. 3: OALP000793.

Br. at 31. According to IDEM, "the ALJ only denied Petitioner's Cross-Motion for Summary Judgment." *Id.* (emphasis added). This is a distinction without a difference. The ALJ's order made clear that HEC's cross-motion "will not be considered."[30] And it is evident from the ALJ's Final Order that her ruling granting summary judgment for AESI on associational standing was based solely on AESI's briefing.[31] Whether labeled as a denial or a strike, the unlawful outcome is the same—HEC was deprived of a ruling on the merits of its own motion, and of a full and fair opportunity to be heard on the merits of a dispositive issue raised by AESI for the first time at summary judgment.

As detailed in HEC's Opening Brief (pp. 49–54), the ALJ denied HEC's cross-motion for summary judgment on associational standing for two reasons. First, while acknowledging HEC filed the cross-motion in response (and on the deadline for responding) to AESI's summary judgment motion, which raised the issue, the ALJ nevertheless concluded the cross-motion was "untimely" filed. Second, the ALJ tossed out the cross-motion because HEC's supporting brief—that the ALJ acknowledged was consolidated with HEC's response brief (thereby combining two briefs into one)—exceeded the 30-page limit for a single brief by five pages.[32] Neither of these grounds provided a lawful basis for the ALJ to "not consider" HEC's cross-motion.

Trial Rule 56(A) unambiguously allows a party to do just what HEC did—cross-move for summary judgment in response to an opponent's motion. *See* Ind. Trial Rule 56(A) (a party may "after service of a motion for summary judgment by the adverse party, move with or without

[30] Rec. Pt. 1: OALP000082.
[31] IDEM suggests that the ALJ considered HEC's arguments on associational standing because the Final Order "cited" HEC's consolidated response brief in a footnote. IDEM Resp. Br. 31. This single footnote is the ALJ's only reference to HEC's consolidated brief, and that footnote pertains to the mercury claim, not associational standing. Rec. Pt. 1: OALP000012 n. 47.
[32] Rec. Pt. 1: OALP000081-000082.

supporting affidavits for a summary judgment in his favor upon all or any part thereof.") In fact, as HEC pointed out to the ALJ, filing such a responsive cross-motion under the Rule is a *routine* practice in Indiana courts. HEC Opening Br. at 50-51. Indeed, AESI's own counsel has filed countless cross-motions for summary judgment in precisely the same circumstances without mention or objection, much less drawing such an extremely unjust sanction like the ALJ imposed here. *See* HEC Opening Br. 51–52 (citing examples that were provided to the ALJ).

Furthermore, denying HEC's cross-motion over a minor page-limit exceedance, without any showing (or finding) of bad faith or prejudice, was a clear abuse of the ALJ's discretion. *See Mayberry v. Am. Acceptance Co., LLC*, 242 N.E.3d 1053, 1056 (Ind. 2024) (directing courts to refrain from imposing severe penalties for technical rule violations unless a violation is egregious, made in bad faith, or prejudices the opposing party). While courts have discretion to enforce procedural rules, that discretion must be exercised *reasonably* given the circumstances and the "general preference to decide cases on their merits in spite of technical errors." *Id.* As HEC explained to the ALJ, going over the page limit was inadvertent and harmless: HEC could have filed two, 30-page briefs, but elected to file a single, consolidated brief for efficiency and clarity.[33]

Tellingly, AESI does not address any of this in its Response Brief. Instead, it presents a litany of other so-called "procedural errors" HEC purportedly committed that AESI insists "justify" the ALJ's ruling. AESI Resp. Br. at 54–56. The problem with this is that none of these

[33] AESI claims that HEC "waived" this argument by failing to raise it below. AESI Resp. Br. 55 n.14. That is demonstrably false. HEC made this exact point to the ALJ. *See* Rec. Pt. 1: OALP000087-000088.

so-called "errors" are mentioned anywhere in any of the ALJ's rulings, much less are they the stated grounds for the ALJ's denial of HEC's cross-motion on associational standing.[34]

But even if HEC's purported errors were indeed technical rule violations, they still would not warrant the punitive sanction the ALJ imposed. *Mayberry,* 242 N.E.3d at 1056. HEC was entitled to a fair consideration of its cross-motion that was timely and properly filed in accordance with routine practice under Trial Rule 56(A). Neither HEC's harmless page-limit exceedance, nor AESI's post-hoc invention of "procedural defects," justify the ALJ's decision "not to consider" it. This Court should reverse.

IV. AESI and IDEM's Arguments Fail to Rebut the Merits of HEC's Clean Water Act Claims

A. HEC's Claims Correctly Recognize the Relationship Between the Clean Water Act and the CCR Rule

Both AESI and IDEM repeat the same strawman argument the ALJ adopted in dismissing HEC's CCR-related discharge claim under Trial Rule 12(B)(6)—that HEC "misunderstands" and is "confused" about the distinction between the federal CCR Rule and the CWA. *See e.g.*, AESI Resp. Br. at 29–34; IDEM Resp. Br. at 12, 15–18. According to AESI, HEC wants "IDEM to use the NPDES permitting process to import requirements applicable to solid waste into a wastewater discharge permit" but the "Permit at issue here does not govern management of the Ash Pond

[34] For instance, AESI insists that HEC "failed to properly label its exhibits." AESI Resp. Br. at 56. In support, AESI points to OALP's Exhibit Best Practices, which are just that – best practices, not formal requirements. And in any event, HEC's exhibits cited by AESI are, in fact, labeled. *See* Rec. Pt. 3: OALP000830 — Rec. Pt. 4: OALP001919 (containing HEC's designated summary judgment exhibits A – J with exhibit labels affixed on the front page of each). Similarly, AESI points out that HEC's Amended Petition "did not include a copy of the Permit at issue," which AESI claims "is required by 315 IAC 1-3-2(c)(3)." AESI Resp. Br. at 56. But AESI did not raise this issue below, the ALJ did not address it in her dismissal order, and – as AESI concedes – the parties were able to easily refer to "Orig. Pet. Ex. A" when referencing and discussing the permit. AESI cannot invent grounds for the ALJ's dismissal that she herself did not rely upon or even have pending before her for consideration.

System under the CCR Rule." AESI Resp. Br. 31–32. In turn, IDEM claims that HEC "incorrectly applies CCR Rules to the NPDES permit." IDEM Resp. Br. 12. The ALJ adopted this same fiction, prematurely dismissing the claim at the pleading stage, as a "collateral attack on AES's compliance with the CCR Rule" and concluding that "appealing AES's NPDES Permit is [not] the proper forum to challenge AES's compliance or non-compliance with the CCR Rule."[35] As established in HEC's Opening Brief (and briefing before the ALJ), none of this is true. *See* HEC Opening Brief at 14-31.[36]

HEC fully understands the difference between the two laws and what they regulate. *See* HEC Opening Br. at 19 (quoting and agreeing with IDEM that there is a "clear distinction between the regulatory schemes governing point source *discharges to surface waters* permitted under the CWA and *the disposal of CCR in surface impoundments* under solid waste rules." (emphasis added)). For that reason, HEC has never asked IDEM to impose any solid waste or CCR Rule requirement in Eagle Valley's NPDES Permit to govern the facility's disposal of coal ash waste in its surface impoundments (the ash ponds) or to "govern[] management of the Ash Pond System under the CCR Rule" as AESI insists. Rather, HEC's claims concern IDEM's failure to impose CWA requirements in Eagle Valley's NPDES Permit that govern the facility's discharges to the White River—discharges that contain coal ash contaminants that have leached from Eagle Valley's coal ash ponds. Those CWA requirements include, among others:

- Best Available Technology ("BAT")-based permit limits on the coal ash contaminants deemed "toxic pollutants" in Eagle Valley's discharges based on the performance of the facility's reverse osmosis treatment system already in use (HEC Opening Br. at 22-31)

[35] Rec. Pt. 6: OALP001974–75 (Dismissal Order at 4–5).
[36] Rec. Pt. 6: OALP001984-1995.

CWA Authorities:

- 40 C.F.R. § 125.3(a)(2)(iii)(B) (requiring case-specific technology-based requirements for toxic pollutants to be based on the more stringent BAT level of pollution control.)

- 40 C.F.R. § 125.3(g) (requiring "TBELs [to] be established 'for solids, sludges, filter backwash, and other pollutants removed in the course of treatment or control of wastewaters in the same manner as for other pollutants.")

- 40 C.F.R. § 122.44(e) (requiring technology-based controls of toxic pollutants to control all such pollutants that "may be discharged at a level greater than the level which can be achieved by the technology-based treatment requirements appropriate to the permittee.")

- 327 IAC 2-1.3-2(38), (43) (defining a "regulated pollutant" subject to NPDES permitting to include "solid waste" that is "discharged to water.")

- *Sw. Elec. Power Co. v. EPA,* 920 F.3d 999, 1006 (5th Cir. 2019) (confirming that BAT "has applied to existing, direct discharges of toxic and non-conventional pollutants since March 31, 1989.")

- *Riverkeeper, Inc. v. EPA,* 358 F.3d 174, 184-85 (2nd Cir. 2004) (technology-based limits must be "based on the leading technology, regardless of the receiving water's quality.")

- Antidegradation review triggered by the newly permitted mercury discharge due to the change in Eagle Valley's operations (HEC Opening Br. *at* 31-34)

CWA Authority:

- 327 IAC 2-1.3-1(b) ("antidegradation implementation procedures . . . apply to a proposed new or increased loading of a regulated pollutant to surface waters of the state from a deliberate activity subject to the Clean Water Act, including a change in process or operation. . .")

- Appropriate permit limits and monitoring requirements to assure the water quality criterion for mercury is met (HEC Opening Br. at 55-62)

CWA Authorities:

- 327 IAC 2-1-6(a)(2)(A), (a)(3) Table 6-1 (surface water concentrations of mercury, a bioaccumulative chemical of concern ("BCC"), must not exceed a 4-day average of 12 ng/l to protect aquatic life from chronic toxic effects)

- 327 IAC 5-2-11.1(b)(6) (in setting water quality-based permit limits for a BCC, the water quality criterion (here a 4-day average of 12 ng/l) is applied "directly to the undiluted discharge")

- 40 CFR § 122.44(i); 327 IAC 5-2-13(a) (a NPDES permit must include monitoring requirements that "assure compliance" with all permit limitations, terms, and conditions)

- EPA Technical Support Document ("TSD") at pp. 107-110 (in calculating the average monthly permit limit for a BCC like mercury where the water quality criterion "is applied at the end of the pipe," at least 4 monthly samples should be assumed in the calculation to avoid the situation where the discharger complies with the permit limit but exceeds the criterion).[37]

- 40 CFR 122.48(b); 327 IAC 5-2-13(c)(2) (monitoring requirements must be of the "type, intervals, and frequency sufficient to yield data which are representative of the monitored activity including, when appropriate, continuous monitoring.")

- EPA TSD at p. 113 (a monitoring frequency of "ideally 10 or more samples per month" should be imposed to "provide the greatest statistical likelihood that the average of the various monthly values will approach the true monthly LTA [long-term average] value" or at minimum, a monitoring frequency that reflects "a reasonable compromise")

- A reasonable potential to exceed ("RPE") analysis to determine whether carcinogens in Eagle Valley's discharges require permit limits to meet Indiana's narrative water-quality criterion to protect human health from cancer (HEC Opening Br. at 62-68)

CWA Authorities:

- 327 IAC 2-1-6(a)(2)(A)(iv) (surface water concentrations of carcinogenic substances must not exceed Indiana's narrative "criterion to protect human health from unacceptable cancer risk of greater than one (1) additional occurrence of cancer per one hundred thousand (100,000) population.")

- 40 CFR § 122.44(d)(1)(i) (NPDES permit limits "must control all pollutants or pollutant parameters" that the permitting authority "determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality.")

[37] Rec. Pt. 1: OALP000280-283.

- EPA TSD Sec. 5.1.1 ("The regulations at 40 CFR 122.44(d)(1) *require* that regulatory authorities first determine whether a discharge causes, has the reasonable potential to cause, or contributes to an excursion above water quality standards (narrative or numeric). In making these determinations, regulatory authorities must use a procedure that accounts for effluent variability, existing controls on point and nonpoint sources of pollution, available dilution, and (when using toxicity testing) species sensitivity.")[38]

- EPA TSD Sec. 3.3.8 ("If a State does not have a numeric water quality criterion for the pollutant of concern, then one of three options for using the narrative criterion may be used (40 CFR 122.44(d)(l)(vi)) to determine whether a discharge causes, has the reasonable potential to cause, or contributes to an excursion above a *narrative* criteria because of an individual pollutant. Although the provisions of 40 CFR 122.44(d)(l)(vi) are presented in the regulation in the context of permit limit development, these same considerations should be applied in characterizing effluents in order to determine whether limits are necessary.")

None of these are solid waste or CCR Rule requirements, and none concern AESI's disposal or management of coal ash waste in its ash ponds.

The CCR Rule enters this case only because AESI tied its own compliance with the CCR Rule to the NPDES Permit. As HEC alleged in its administrative petition—which must be taken as true under Trial Rule 12(B)(6)—AESI's Corrective Measures Plan for preventing the migration of coal ash contaminated groundwater from reaching the White River states that Eagle Valley's high-capacity production wells "capture" the groundwater before it reaches the White River, and the NPDES Permit ensures that the contaminants are "contained." HEC Opening Br. at 17.[39] In other words, AESI made the NPDES Permit the mechanism for satisfying its CCR Rule obligations; HEC did not.

As IDEM's response brief points out, the CCR Rule requires "that discharge from the CCR unit must be handled in accordance with the surface water requirements of the CWA." IDEM Resp.

[38] Rec. Pt. 1: OALP000266.
[39] Rec. Pt. 6: OALP002069-70 (Amended Petition at ¶¶ 9-10).

Br. at 13 (quoting 40 C.F.R. § 257.82(b)); *see also* 40 C.F.R. § 257.3-3(a). According to IDEM, "[b]y obtaining its NPDES Permit, AESI has complied with 40 C.F.R. § 257.82(b) [of the CCR Rule], as the Permit authorizes its discharge into the White River pursuant to the CWA and its implementing regulations." IDEM Resp. Br. at 13. Plainly, IDEM understands the link between the NPDES Permit and AESI's compliance with the CCR Rule—so does AESI. AESI Resp. Br. at 30 (stating "the CCR Rule . . . requires that '[d]ischarge from the CCR unit must be handled in accordance with the surface water requirements under §257.3-3,' which in turn refers to NPDES permitting of those discharges.") Thus, if the "NPDES permitting of those discharges" violates the CWA, then the CCR Rule is violated as well.

In sum, this case is not a "collateral attack" on AESI's compliance with the CCR Rule—it is a straightforward NPDES permit challenge under the CWA that has implications for AESI's compliance with the CCR Rule. While the CCR Rule and CWA have distinct regulatory roles, they nevertheless intersect by design. HEC understands that relationship, which is the basis of its CCR-related discharge claim.

B. HEC Did Not Waive its Argument that IDEM Failed to Impose Best Available Technology ("BAT")-Based Limits in the Permit

AESI next claims that HEC "waived" its argument that IDEM failed to include BAT-based limits in the NPDES Permit. AESI Resp. Br. at 34. In support, AESI asserts that "[p]rocedurally, HEC waived this argument below" and again on judicial review by "ignor[ing] the ALJ's holding on [waiver]" in its Opening Brief. *Id.* Both assertions are wrong—the former disregards Indiana's notice-pleading standard; the latter ignores HEC's Opening Brief where HEC squarely addresses the ALJ's erroneous ruling on waiver. HEC Opening Br. at 23-25.

There, HEC discusses in detail the ALJ's error in adopting AESI's same incorrect argument; that HEC had "improperly raise[d] two (2) new claims" in its response to IDEM and

AESI's motions to dismiss "related to technology-based effluent limitations [TBELs] and IDEM's application of best professional judgment [BPJ]." HEC Opening Br. at 24 (quoting OEA's Dismissal Order at ¶12).[40] But as HEC explained in its Opening Brief, these are not new claims—they are legal arguments supported by established legal authorities that support HEC's CCR-related discharge claim.

Specifically, HEC's administrative petition alleged that IDEM violated the CWA (and in turn, the CCR Rule) by allowing Eagle Valley to mix the RO waste stream containing removed coal-ash contaminants back into the spent cooling water discharged to the White River, rather than requiring proper disposal.[41] IDEM and AESI moved to dismiss arguing IDEM had "no authority" under the CWA to require this, and in response, HEC presented legal authorities governing TBELs and IDEM's exercise of BPJ, demonstrating the Respondents are wrong—IDEM can and must set BAT-based TBELs on Eagle Valley's coal ash discharges to the White River to achieve that outcome. HEC Opening Br. at 25-29.[42]

In its reply below, AESI argued (and the ALJ agreed) that this was a "new claim" that HEC waived because HEC's administrative petition did not cite to these authorities. AESI Resp. Br. at 34. But as detailed in HEC's Opening Brief (pp. 23-25), that argument ignores Indiana's established notice pleading standard, adopted in AOPA proceedings, where a party's administrative petition is to be "liberally construed" and "need not enumerate precisely every event to which a hearing examiner may finally attach significance." *Ind. Office of Envtl. Adjudication, Dep't of Envtl. Mgmt. v. Kunz,* 714 N.E.2d 1190, 1195–96 (Ind. Ct. App. 1999).

---

[40] Rec. Pt. 6: OALP001976 (OEA Dismissal Order at ¶12); Rec. Pt. 6: OALP002008 (AESI Reply in Support of Motion to Dismiss at 9).
[41] Rec. Pt. 6: OALP002077 (Amended Petition at ¶57).
[42] Rec. Pt. 6: OALP001986-89 (HEC Resp. to AESI and IDEM Motions to Dismiss at 6-9).

Indeed, Indiana's notice pleading standard set forth in Trial Rule 8, requires only "a short and plain statement of the claim showing that the pleader is entitled to relief" and directs courts to construe pleadings "to do substantial justice" and decide cases on their merits. *See* Ind. Trial Rule 8(A), (F). This is why a complaint—or here, an administrative petition—is sufficient under Trial Rule 12(B)(6) "if it states any set of allegations, no matter how unartfully pleaded, upon which the trial court could . . . grant relief." *McQueen v. Fayette Cnty. Sch. Corp.,* 711 N.E.2d 62, 65 (Ind. Ct. App. 1999). For that reason, prematurely dismissing HEC's CCR-related discharge claim, without giving HEC "an opportunity to provide additional evidence or to develop the arguments more fully" is contrary to both Trial Rule 12(B)(6) and AOPA. *Huffman,* 811 N.E.2d at 814 (also concluding that premature dismissal has the added consequence that an ALJ's findings will not be supported by evidence).

And in any event, courts are obligated to ascertain and apply the correct law regardless of whether the parties properly bring the law to the court's attention. *Dedelow v. Pucalik*, 801 N.E.2d 178, 184 (Ind. Ct. App. 2003).

There is simply no requirement for HEC to have fully developed its claims and legal arguments at the pleading stage. The ALJ's conclusion otherwise was clear error. And that error was fully addressed in HEC's Opening Brief, despite AESI's demonstrably false claim to the contrary. AESI's assertion that HEC "curiously" failed to raise this issue in its Opening Brief is refuted by the brief itself. HEC did not "procedurally waive" its argument on TBELs below and has not waived the issue now.

C. The National Effluent Guidelines for the Steam Electric Power Industry Do Not Preempt the Requirement for IDEM to Impose BAT-Based TBELs in This Permit

There is no dispute that IDEM exercised its best professional judgment ("BPJ") to derive technology based effluent limits ("TBELs") based on the less stringent "best practicable control

technology (BPT)," for certain conventional pollutants in Eagle Valley's discharge to the White River. IDEM Resp. Br. at 21. IDEM did not derive any TBELs—BPT or BAT-based—for any of the toxic coal ash pollutants in Eagle Valley's discharges.[43] This is so, even though there is a technology already in use at Eagle Valley to remove those toxic pollutants from the pumped groundwater before it is used in the plant's processes. AESI Resp. Br. at 10-11; IDEM Resp. Br. at 12.[44] These facts are undisputed. More importantly, they are alleged in HEC's administrative petition[45] and must be taken as true under Trial Rule 12(B)(6).

As HEC demonstrated below and in its Opening Brief, based on these facts, IDEM should have imposed case-specific, BAT-based TBELs of zero or close to it on the toxic coal ash pollutants removed by the existing RO treatment system so that they are properly disposed, not mixed back in with the wastewater discharged to the River. HEC Opening Br. at 27. AESI and IDEM disagree, arguing that EPA's National Effluent Limitation Guidelines for Eagle Valley's industry (the "Steam Electric ELG") do not require such TBELs. AESI Resp. Br. at 36-37; IDEM Resp. Br. at 20-23.

In support, IDEM and AESI advance conflicting arguments—both are wrong. AESI insists that IDEM can only develop case-by-case TBELs "when EPA has not yet developed effluent guidelines *for a particular industry*." AESI Resp. Br. at 36. But that view is undermined by CWA regulation that expressly requires "case-by-case" TBELs even if there is an industry ELG in place when, as here, the ELG "only applies to certain aspects of the discharger's operation, *or to certain pollutants*." 40 C.F.R. § 125.3(c)(3) (emphasis added).

---

[43] Rec. Pt. 3: OALP000956-57, OALP000959-60 (NPDES Permit Factsheet (requiring only "monitoring" for the coal ash pollutants)).
[44] Rec. Pt. 3: OALP000949 (NPDES Permit Fact Sheet describing the RO system as treating the groundwater and generating a waste stream); Rec. Pt. 3: OALP000950 (Process Flow Diagram).
[45] Rec. Pt. 6: OALP002065 fn. 4, 6-8 (HEC Amended Petition at 5 (citing to pdf pages 12, 16-27 of AESI's *Report on Corrective Measures Assessment* of October 2019 prepared by Haley Aldrich.))

For its part, IDEM confirms that it did apply case-specific TBELs for Eagle Valley's three waste streams that are combined but applied only the less stringent BPT-based industry ELG for just one of those waste streams. IDEM Resp. Br. at 21-22. According to IDEM, the Steam Electric ELG did not require it to "calculate [case-specific] TBELs for any waste streams or pollutants outside of what was required by the applicable ELGs." IDEM Resp. Br. at 22.[46] But 40 C.F.R. § 125.3 says otherwise.

Permitting agencies must set "case-by-case" TBELs when "certain aspects of the discharger's operation, *or certain pollutants*" are not covered by the industry's ELG. 40 C.F.R. § 125.3(c)(3) (emphasis added). That is precisely the situation here. As IDEM confirms, there are toxic coal ash pollutants in Eagle Valley's discharge to the White River that are not covered by the Steam Electric ELG. IDEM Resp. Br. at 22. But contrary to IDEM's view, that gap in coverage does not allow the agency to let those toxic pollutants go unregulated. The CWA mandates that IDEM step in and fill that regulatory gap by setting case-specific TBELs for "all toxic pollutants"[47] in Eagle Valley's discharge based on the more stringent BAT level of pollution control. 40 C.F.R. 125.3(a)(2)(iii), (iv); *Sw. Elec. Power Co.,* 920 F.3d at 1006 (confirming BAT "has applied to existing, direct discharges of toxic and non-conventional pollutants since March 31, 1989").

Nevertheless, IDEM insists that although it did not calculate any TBELs for the coal ash contaminants in Eagle Valley's discharges (based on BPT or BAT), it "did conduct a reasonable

[46] IDEM acknowledges that the Steam Electric ELG requires a BAT-based TBEL of "no detectable amount" to be imposed for the "126 toxic priority pollutants" in the "chemicals added for cooling tower maintenance," but does not say why it gave Eagle Valley a pass on having to comply with that ELG. IDEM Resp. Br. at 21-22; Rec. Pt. 3: OALP000954 (Fact Sheet).

[47] EPA has identified 65 pollutants and classes of pollutants as "toxic pollutants." 40 CFR § 401.15. Those include antimony, arsenic, barium, cadmium, cobalt, lead, lithium, molybdenum, thallium, and selenium, which are also CCR contaminants that IDEM identified in Eagle Valley's discharges. Rec. Pt. 3: OALP000956-957.

potential to exceed water quality criteria analysis for the CCR contaminates with monitoring requirements for those parameters." IDEM Resp. Br. at 22. What that is true, it is irrelevant. IDEM's RPE analysis (which did not consider the cancer criteria and resulted in no water-quality based permit limits on coal ash contaminants), does not alleviate the agency's regulatory obligation to impose technology-based limits on those contaminants. TBELs must be "based on the leading technology, regardless of the receiving water's quality" and must "become more stringent over time" until the CWA's goal of eliminating pollution discharges is achieved. *Riverkeeper, Inc. v. EPA,* 358 F.3d 174, 184-85 (2nd Cir. 2004) (emphasis); *NRDC v. EPA,* 808 F.3d 556, 563-64 (2nd Cir. 2015) (TBELs "should force agencies and permit applicants to adopt technologies that achieve the greatest reductions in pollution" regardless of water quality criteria). Here, a technology exists, and is already in use at Eagle Valley, that could eliminate the facility's discharges of toxic coal ash pollution of the White River. IDEM's failure to impose BAT-based TBELs to require proper disposal of the that existing technology's waste stream violates the CWA.

Despite this clear legal authority, all presented to the ALJ below,[48] AESI contends the ALJ was correct to conclude that "HEC offers no cogent support for its contention that IDEM did not exercise BPJ or that best available control technology (BAT) applied to the combined wastestreams." AESI Resp. Br. at 35. In support, AESI invents the term "raw groundwater" to describe the coal ash contaminated groundwater it uses for process water at Eagle Valley, to side-step the requirement that "[TBELs] shall be established . . . for solids, sludges, *filter backwash, and other pollutants removed in the course of treatment* or control of wastewaters in the same manner as for other pollutants." AESI Resp. Br. at 35 (quoting 40 C.F.R. § 125.3(g) (emphasis

[48] Rec. Pt. 6: OALP001985-1988.

added)). As AESI sees it, this provision "applies to wastewater treatment systems, not raw water treatment systems." AESI Resp. Br. at 35. There are at least three problems with this.

First, the CWA makes no distinction between a technology that treats wastewater versus "raw water." For that matter, the term "raw water" is nowhere to be found in the NPDES Permit, IDEM's Factsheet for the NPDES Permit, or any provision of the CWA and its implementing regulations.

Second, AESI's own description of the RO system confirms that 40 C.F.R. § 125.3(g) applies. According to AESI, the RO system generates "filter backwash" and "reject water" in the course of "purifying" the polluted groundwater as soon as it enters the plant. AESI Resp. Br. at 11. In turn, IDEM's Factsheet describes the RO system as part of the facility's "wastewater treatment system" that itself "generate[s] wastewater."[49] Plainly, the mandate in 40 C.F.R. § 125.3(g) that TBELs "shall be established" for "*filter backwash, and other pollutants removed in the course of treatment,*" applies to the wastewater generated by the RO treatment system. AESI's invented term "raw groundwater" does not magically make the requirement inapplicable.

Third, irrespective of whether 40 C.F.R. § 125.3(g) applies, case-specific BAT-based TBELs for the toxic coal ash contaminants in Eagle Valley's discharge is still required by: 40 C.F.R. § 125.3(c)(3) (case-specific TBELs are required when "certain aspects of the discharger's operation, *or certain pollutants*" are not covered by the industry's ELG (emphasis added)); 40 C.F.R. 125.3(a)(2)(iii), (iv) (TBELs for "all toxic pollutants" must be based on the BAT level of pollution control); and 40 CFR 125.3(e), which makes clear that TBELs "are applied prior to or at the point of discharge."

[49] Rec. Pt. 3: OALP000949.

In short, neither the existence of EPA's Steam Electric ELG nor AESI's invented term "raw groundwater" relieves IDEM of its regulatory duty to impose BAT-based technology limits on the toxic coal-ash pollutants discharged from Eagle Valley. Those pollutants are not covered by the industry ELG and must therefore be controlled through case-specific BAT-based TBELs under 40 C.F.R. § 125.3. The ALJ's acceptance of AESI's contrary arguments disregarded the plain language of the CWA and its implementing regulations, allowing pollutants that the Act requires to be eliminated to flow unregulated into the White River. The Court should reverse that error and remand with instructions for IDEM to apply BAT-based limits consistent with federal law.

D. IDEM's Antidegradation Decision from Eight Years Ago is Not the Subject of This Permit Appeal

AESI and IDEM both mischaracterize HEC's antidegradation claim by focusing on IDEM's 2015 permitting decision rather than the 2023 permit that is before the Court. AESI asserts that "HEC's issue is with the 2015 permit and HEC's effort to recast its antidegradation claim as a challenge to the 2023 Permit's mercury limits is too little, too late." AESI Resp. Br. at 39. IDEM similarly claims that HEC "continues to identify a change in Eagle Valley's process or operations at the time of the 2015 modification and 2017 renewal but did not file an appeal at either of those times." IDEM Resp. Br. at 23. These arguments are beside the point. HEC is not appealing IDEM's 2015 permit modification or the 2017 renewal. As HEC's administrative petition makes clear, the question before the Court is whether IDEM's 2023 NPDES Permit violates the CWA and Indiana's antidegradation requirements by authorizing a new discharge of mercury without requiring the antidegradation review that the law mandates. HEC Opening Br. at 31-34.[50]

[50] Rec. Pt. 6: OALP002077-2079 (HEC's Amended Petition at 17-19)

IDEM's Factsheet for the 2023 Permit confirms that the agency's 2015 determination that no mercury limits or antidegradation review were needed was based solely on AESI's "estimates" and "projections" that overall mercury loadings would decrease once the coal to natural gas conversion was completed.[51] Those projections proved wrong. Actual effluent data submitted with the 2023 permit application showed mercury concentrations higher than those projected in 2015, prompting IDEM to include new mercury limits in the 2023 permit.[52]

Under 327 IAC 2-1.3-1(b), the inclusion of new mercury limits in the 2023 Permit triggered antidegradation review because those limits were "the result of a deliberate activity"—namely, AESI's operational changes, including its use of coal-ash-contaminated groundwater as process water.[53] IDEM nonetheless declined to conduct that review, reasoning that "the new effluent limitations are not the result of a deliberate activity taken by the permittee."[54] That conclusion is the very decision HEC challenges, because it directly contradicts IDEM's own 2023 Fact Sheet, which links the new mercury limits to AESI's deliberate operational changes.

AESI now contends that HEC "alleged no facts to support the claim that these new mercury limits resulted in a new or increased loading." AESI Resp. Br. at 39. But that misstates the legal standard. As IDEM itself explained in its 2023 Fact Sheet:

> Indiana's antidegradation standards . . . [prohibit a permittee from] undertaking any deliberate action that would result in a *new* or increased *discharge* of a bioaccumulative chemical of concern (BCC) or *a new* or increased *permit limit* for a regulated pollutant that is not a BCC *unless information is submitted . . . demonstrating that the proposed new or increased discharge will not cause a significant lowering of water quality*, or antidegradation demonstration submitted and approved in accordance with 327 IAC 2-1.3-5 and 2-1.3-6.

---

[51] Rec. Pt. 3: OALP000961 (IDEM Factsheet).
[52] Rec. Pt. 6: OALP002078-79 (Amended Petition quoting IDEM's Factsheet).
[53] Rec. Pt. 3: OALP000961 (IDEM Fact Sheet); Rec. Pt. 6: OALP002078 (Amended Petition quoting IDEM's Factsheet).
[54] Rec. Pt. 3: OALP000961 (IDEM Fact Sheet); Rec. Pt. 6: OALP002078 (Amended Petition quoting IDEM's Factsheet).

> This permit includes new effluent limitations for mercury. In accordance with 327 IAC 2-1.3-1(b), *the new effluent limitations are not subject to the Antidegradation* Implementation Procedures in 327 IAC 2-1.3-5 and 2-1.3-6 *as the new effluent limitations are not the result of a deliberate activity taken by the permittee.*[55]

By IDEM's own explanation, antidegradation review is required whenever a permittee's deliberate activity results in a "new discharge" or "new permit limit"; while an activity that results in an increased discharge or permit limit can also require review, that is not the only circumstance that does so. The 2023 permit's inclusion of new mercury limits is itself evidence of a new mercury discharge that required AESI to demonstrate that it would not cause a significant lowering of water quality. IDEM's sole rationale for declining to require that showing—that the new limits "are not the result of a deliberate activity"—is the decision HEC challenges. Having alleged that the new mercury limits stem directly from AESI's deliberate operational changes, HEC has satisfied the pleading standard under Trial Rule 12(B)(6).

Finally, Respondents' insistence that HEC's failure to challenge the 2015 permit now bars review IDEM's 2023 decision has no foundation in the law. An un-appealed past permit cannot immunize a later, separate permit decision that rests on new data and new conditions. HEC Opening Br. at 32. The 2023 permit renewal is a distinct agency action with its own administrative record and legal consequences. IDEM's decision in 2023 to authorize new mercury discharges that are the direct result of AESI's operational changes without an antidegradation demonstration is the basis of HEC's claim. The ALJ's dismissal of that claim based on IDEM's unrelated 2015 determination should be reversed.

[55] Rec. Pt. 3: OALP000961 (IDEM Fact Sheet); Rec. Pt. 6: OALP002078 (Amended Petition quoting IDEM's Factsheet).

E. AESI and IDEM Still Fail to Confront HEC's Actual Arguments and Evidence in Support of Its Mercury Claim, Contrary to Trial Rule 56

IDEM and AESI persist in mischaracterizing HEC's mercury claim, again sidestepping the actual issue before the Court. Seizing on two paragraphs of HEC's Amended Petition, they insist that the ALJ was justified in treating HEC's mercury claim as two stand-alone claims—one contesting the maximum daily limit ("MDL"), and another contesting the monitoring frequency. AESI Resp. Br. at 40-41; IDEM Resp. Br. at 26-27. The ALJ was not justified in doing so. Such a narrow parsing of HEC's administrative petition, while ignoring the evidence and legal arguments HEC advanced in support of its mercury claim, violates Trial Rule 56.

While the purpose of summary judgment "is to terminate litigation when no factual dispute exists and the case may be determined as a matter of law," it "must be granted with caution . . . so that a party's right to a fair determination of genuine issues is not thwarted." *Vanco v. Sportsmax, Inc.*, 448 N.E.2d 1198, 1200 (Ind. Ct. App. 1983). To that end, the burden is on the moving party "to negate the existence of any genuine issue of material fact" and "[a]ll doubts are to be resolved against him." *Id.* The court "must consider all the pleadings, depositions, answers to interrogatories, admissions, and affidavits on file, as well as any testimony, to determine whether a genuine issue of material fact exists." *Id.* (emphasis added). Furthermore, "[t]he products of discovery are to be liberally construed in the opponent's favor." *Id.* And "[e]ven if the facts are not in dispute, summary judgment is inappropriate when a good faith dispute exists regarding the inferences to be drawn from these facts." *Id.* The ALJ disregarded this established standard in granting summary judgment for AESI and IDEM on HEC's mercury claim.

While AESI is correct that HEC's administrative petition alleges that both the 20 ng/l daily maximum limit and the infrequent monitoring for mercury violates the CWA, those two allegations do not raise two separate claims—they are part of a single claim. Specifically, setting an MDL of

20 ng/l combined with a monitoring requirement of one grab sample every other month will not assure compliance with the Permit's average monthly limit of 12 ng/l or the water quality criterion ("WQC") of 12 ng/l.[56] If there were any question, HEC clarified the nature of this claim early in the proceeding in responding to AESI's written discovery:

> Interrogatory No. 2: Provide factual information and the legal basis for Your claim that the Permit's Mercury daily maximum limit should be 12 ng/l . . .
>
> **Answer: Petitioner's counsel objects to this Interrogatory because it misstates the claim set forth in the Third Deficiency of HEC's Amended Petition at ¶¶64-66. The claim is based on the fact that setting a daily maximum limit for Mercury at 20 ng/l will not ensure compliance with the monthly average limit or the WQC for Mercury of 12 ng/l because the Permit requires monitoring just once every other month . . .**
>
> **[I]t is a basic mathematical principle that the average of one number is the number itself. Stated differently, the average of one monthly grab sample is the value of the sample itself.[57]**

HEC reinforced this same point during summary judgment briefing and supported it with evidence including, among other things, IDEM's dispositive admission that "if the one required grab sample taken every other month meets the daily maximum limit of 20 ng/l, it will violate the monthly average limit of 12 ng/l and the WQC for mercury."[58] As reiterated again at pages 55–56 of HEC's Opening Brief, the claim is—and always has been—that the limits and monitoring together cannot ensure compliance with the mercury WQC. AESI's suggestion otherwise—that HEC is now "revising" its mercury claim "to avoid the ALJ's ruling"—is baseless. AESI Resp. Br. at 41. It is AESI who persists in revising HEC's mercury claim and the evidence that supports it to avoid the ALJ's ruling, which is based on the same error of law and fact, contrary to Trial Rule 56.

---

[56] Rec. Pt. 6: OALP002079-2080 (Amended Petition at ¶¶64-67).
[57] Rec. Pt. 5: OALP1856-1857 (HEC's Ans. to AESI Interrogatory 2).
[58] Rec. Pt. 1: OALP000138-139 (HEC's Cons. Summary Judgment Br. at 28-29); Rec. Pt. 3: OALP000873 (IDEM's Ans to HEC Interrogatory 12).

F. AESI's Argument that "Water Quality Criteria Are Directly Enforceable Against Dischargers" Attacks a Strawman, Not HEC's Mercury Claim

AESI insists that HEC's mercury claim is an attempt to "directly enforce water quality criteria against dischargers." AESI Resp. Br. at 41-47; IDEM Resp. Br. at 27-28. In support, AESI devotes several pages of its response brief to discussing the differences between water quality standards and effluent limits to conclude that "the fact that the WQC for mercury is 12 ng/l does not mean that IDEM must apply 12 ng/l as the MDL in the Permit." AESI Resp. Br. at 42. HEC never said it does. HEC Opening Br. at 55 (reiterating that HEC does not claim that IDEM must include an MDL of 12 ng/l in the permit.) What HEC does contend, and the law and basic math dictate, is that setting an MDL of 20 ng/l combined with a monitoring infrequency of one grab sample every other month cannot assure compliance with either the Permit's AML or the WQC for mercury of 12 ng/l contrary to 327 IAC 5-2-11.1(b)(6) (mandating the WQC for a BCC like mercury "shall be applied directly to the undiluted discharge") HEC Opening Br. at 55-56. The regulation says so and IDEM said so in the Permit's Factsheet.[59] That claim is not an attempt to enforce the WQC for mercury against AESI.

AESI and IDEM persist in this distortion of HEC's claim to avoid addressing IDEM's sworn and dispositive admission that "if the one required grab sample taken every other month meets the daily maximum limit of 20 ng/L, it will violate the monthly average limit of 12 ng/L and the WQC for mercury."[60] EPA's Technical Support Document for Water Quality–Based Toxics Control ("TSD")—the very guidance IDEM claims to have followed—explains precisely why this result is impermissible. The TSD directs that permit limits must reflect the expected variability in

[59] Rec. Pt. 3: OALP000994
[60] Rec. Pt. 1: OALP000138-139 (HEC's Cons. Summary Judgment Br. at 28-29); Rec. Pt. 3: OALP000873 (IDEM's Ans to HEC Interrogatory 12).

pollutant discharges. In most circumstances, the MDL is supposed to be higher than the AML to allow for fluctuations in the discharges.[61] However, when monitoring occurs less frequently than monthly, the long-term average on which the monthly limit is based cannot be accurately characterized.[62]

Put simply, the daily maximum permit limit should account for short-term variability in discharges; the monthly average ensures compliance with long-term water-quality standards. But where both limits are derived from a single measurement taken only once every other month, the "average" and the "maximum" become the same number, as IDEM itself admitted under oath.

To avoid this outcome, Section 5.5.3 of the TSD directs that when sampling occurs once per month or less, "at least four monthly samples" must be assumed to derive statistically valid limits. Otherwise, the average monthly limit converges with the daily maximum—exactly what has occurred here.[63] *See also American Petroleum Institute v. EPA*, 661 F.2d 340, 365 (5th Cir. Unit A 1981) (confirming that "if sampling is required only on a monthly basis, the monthly average limitation would be the same as the daily maximum"). By setting the MDL higher than the AML but requiring only one sample every other month to demonstrate compliance with both, IDEM ignored the TSD's statistical framework and effectively rendered the two limits indistinguishable. The result is a permit that provides no meaningful assurance that the mercury WQC will be met.

AESI's discussion of IDEM's "historical practice" in imposing the same flawed permit limits and monitoring frequencies in other industrial permits (AESI Resp. Br. at 46-47) only confirms that IDEM's approach is wrong. EPA's TSD confirms that the set monitoring frequency

[61] Rec. Pt. 1: OALP000269.
[62] Rec. Pt. 1: OALP000269.
[63] Rec. Pt. 1: OALP000280–283.

must be case-specific and sufficient to capture variability, which would "ideally [be] ten or more samples per month."[64] Instead, IDEM required only six grab samples per year—one every other month—and none in the intervening months. That schedule is markedly inconsistent with the TSD's most basic principles. The result is a NPDES Permit that requires no sampling at all for 359 days of the year, making it mathematically impossible to assure compliance with the monthly average permit limit and the water quality criterion for mercury—as IDEM itself admitted.

No rule gives IDEM discretion to disregard the law and EPA guidance in favor of a flawed "historical practice." Agency decisions must rest on "ascertainable standards" to ensure they are "fair, orderly, and consistent rather than irrational and arbitrary." *Podgor v. Indiana Univ.*, 381 N.E.2d 1274, 1283 (Ind. Ct. App. 1978). Merely repeating an erroneous practice does not make it lawful. IDEM's reliance on past permitting habits—and the ALJ's acceptance of them—cannot override the CWA's mandate that permits include monitoring and effluent limitations sufficient to assure compliance with water-quality standards. Here, they do not.

In short, AESI's argument that "water-quality criteria are not directly enforceable against dischargers" misstates HEC's claim. HEC does not seek to enforce the WQC itself; it seeks enforcement of IDEM's regulatory duty to ensure, through properly derived limits and monitoring, that those criteria are met. That is what 327 IAC 5-2-11.1(b)(6), the EPA's TSD, and basic statistical logic all require. Because IDEM failed to do that here, and the ALJ approved that unlawful decision, this Court should reverse.

G. IDEM Must Consider *All* Applicable Water Quality Criteria—Including Narrative Criteria—in Conducting the Reasonable Potential to Exceed Analysis.

[64] Rec. Pt. 1: OALP000286.

As detailed fully in HEC's Opening Brief (pp. 62-66), IDEM also ignored the law and EPA guidance on protecting human health from cancer. Although IDEM identified arsenic, beryllium, cadmium, and lead as "probable or known human carcinogens" and "pollutants of concern" in Eagle Valley's discharges, it declined to evaluate whether those pollutants may exceed Indiana's human-health cancer criterion simply because the criterion is narrative rather than numeric.[65] This flatly contradicts EPA's TSD, including Sections 3.3.8 and 5.1.1, which direct that when numeric criteria are absent, the permitting authority is *required* to use one of several methods for using narrative criteria in the RPE analysis to determine whether permit limits are necessary. HEC Opening Br. at 65 (quoting TSD §§ 3.3.8 and 5.1.1).[66]

In its response, IDEM ignores this clear TSD guidance and continues to maintain that it "was not required by law to derive numeric human health cancer criteria." IDEM Resp. Br. at 29. To be clear, HEC is not suggesting IDEM must derive new criteria, numeric or otherwise, for purposes of the RPE analysis. Rather, HEC claims—and the law requires—IDEM to conduct the RPE analysis based on all existing criteria, including criteria that are in narrative form. 40 CFR § 122.44(d)(1)(i). As the ALJ confirmed, Indiana already has "a narrative criterion 'to protect human health from unacceptable cancer risk of greater than one (1) additional occurrence of cancer per one hundred thousand (100,000) population.'"[67]

Given that existing, narrative criterion, IDEM was required by law to assess whether the levels of carcinogens it identified in Eagle Valley's discharges have a reasonable potential to exceed that criterion. HEC Opening Br. at 64-66 (discussing 40 CFR § 122.44(d), the draft rule for

[65] Rec. Pt. 3: OALP001003-04 (NPDES Permit-Attachment 8); Rec. Pt. 5: OALP001843-44 (IDEM Answers to Requests to Admit 1-7); Rec. Pt. 3: OALP000870-71 (IDEM Answers to Interrogatories 5, 6 and 7).
[66] *See also* Rec. Pt. 1: OALP000235, 266 (EPA's TSD Sections 3.3.8 and 5.1.1).
[67] Rec. Pt. 1: OALP000013 (OALP Final Order at 13 (citing 327 IAC 2-1-6(a)(2)(A)(iv)).

40 CFR § 122.44(d)). EPA's TSD that IDEM claims to have followed in this case could not be clearer on this point:

> Section 5.5.1:
>
> The regulations at 40 CFR 122.44(d)(1) *require* that regulatory authorities first determine whether a discharge causes, *has the reasonable potential to cause*, or contributes to an excursion above water quality standards (*narrative* or numeric). In making these determinations, regulatory authorities *must use a procedure* that accounts for effluent variability, existing controls on point and nonpoint sources of pollution, available dilution, and (when using toxicity testing) species sensitivity. Each of these regulations were previously discussed in Chapter 3.
>
> . . . .
>
> Section 3.3.8:
>
> If a State does not have a numeric water quality criterion for the pollutant of concern, then *one of three options* for using the narrative criterion may be used (40 CFR 122.44(d)(l)(vi)) to determine whether a discharge causes, has the reasonable potential to cause, or contributes to an excursion above a *narrative* criteria because of an individual pollutant. Although the provisions of 40 CFR 122.44(d)(l)(vi) are presented in the regulation in the context of permit limit development, these same considerations should be applied in characterizing effluents in order to determine whether limits are necessary.[68]

Ignoring this, IDEM states that HEC "fails to offer evidence to show on what basis IDEM should have determined that AESI will be discharging CCR contaminants at a concentration that warranted a potential to exceed analysis for the narrative human health criteria other than the mere presence of the CCR contaminants alone." IDEM Resp. Br. at 30. There are two key problems with that argument.

First, IDEM did not just identify the "mere presence of CCR contaminants" in Eagle Valley's discharge. IDEM identified "*known carcinogens*" as "pollutants of concern" in the facility's discharge.[69] Second, IDEM recognized the significance of those pollutants by evaluating

[68] Rec. Pt. 1: OALP000235, OALP000266 (EPA TSD at 62, 93).
[69] Rec. Pt. 3: OALP001003.

them against Indiana's numeric aquatic-life criteria, yet it inexplicably declined to apply the existing narrative human-health criterion specifically designed to address cancer risk.[70] In other words, IDEM selectively applied only part of the governing regulatory framework and ignored the rest, effectively reading the narrative cancer criterion out of Indiana's water-quality standards altogether. This was clear legal error.

By treating the narrative human-health criterion as unenforceable, IDEM failed to perform the reasonable potential analysis required by 40 C.F.R. § 122.44(d)(1) and 327 IAC 2-1-6(a)(2)(A)(iv). The ALJ compounded that error by adopting IDEM's rationale wholesale, disregarding both the plain text of the governing regulations and the EPA's Technical Support Document that IDEM claims to have followed. HEC's claim does not ask the Court to create new standards—it asks only that IDEM apply the ones already in force. The Court should therefore reverse the ALJ's ruling on HEC's cancer-criteria claim and remand for IDEM to conduct a lawful reasonable-potential analysis that accounts for the carcinogenic pollutants in Eagle Valley's discharge, consistent with the CWA, EPA guidance, and Indiana law.

CONCLUSION

The Court's task under the amended AOPA is to independently determine, without deference to the agency, whether the ALJ's rulings were supported by the record and the law. AESI's insistence that this Court defer to the ALJ's factual findings—and AESI's reliance on repealed precedent applying the "substantial evidence" standard—misstates the governing standard of review and invites the very judicial deference the legislature abolished. Applying the correct standard, the ALJ's Final Order cannot stand.

---

[70] Rec. Pt. 3: OALP001003 (NPDES Permit-Attachment 8 (calculating preliminary effluent limits for the identified carcinogens-- arsenic, beryllium, cadmium, and lead—based on *numeric* water quality criteria)).

Each of the ALJ's three dispositive orders—which encompass the premature dismissal of HEC's well-pled CCR-related discharge and antidegradation claims, the ALJ's grant of summary judgment on HEC's associational standing under the wrong legal standard and refusal to consider HEC's timely cross-motion, and disregard of undisputed evidence on standing, mercury and carcinogens—were arbitrary, unlawful, and unsupported by the record. And none of AESI's or IDEM's arguments justify those rulings. All of their arguments rest on mischaracterizations of HEC's claims, misstatements of the governing law, and a selective reading of the record that mirror the very errors underlying the ALJ's Final Order.

For these reasons, and as detailed in HEC's Opening Brief and this Reply, the Court should reverse the OALP's Final Order as arbitrary, capricious, contrary to law, and unsupported by a preponderance of the evidence. The Court should remand this matter to IDEM with instructions to issue a lawful NPDES permit for Eagle Valley that complies with the Clean Water Act, its implementing regulations, and Indiana's water-quality standards—and that protects the health and environment of the Hoosiers living downstream.

Respectfully submitted,

/s/ *Kim E. Ferraro*
Kim E. Ferraro, Attorney No. 27102-64
Allison Gardner, Attorney No. 34596-53
Conservation Law Center
116 South Indiana Avenue
Bloomington, Indiana 47408
812/856-5737
kimferra@iu.edu
alligard@iu.edu

CERTIFICATE OF SERVICE

I certify that the foregoing document was served upon the following attorneys of record via Court's electronic filing system on this 10th day of November, 2025:

E. Sean Griggs
Alexandra R. French
Kathleen Waak
Barnes & Thornburg, LLP
11 S. Meridian Street
Indianapolis, Indiana 46204
Sean.Griggs@btlaw.com
afrench@btlaw.com
Kathleen.waak@btlaw.com

Emily A. Witker
Ellen M. Queen
Office of Attorney General Todd Rokita
Indiana Government Center South
5th Floor
Indianapolis, Indiana 46204
Emily.Witker@atg.in.gov
Ellen.Queen@atg.in.gov

/s/ *Kim E. Ferraro*