

**OBJECTION TO THE ISSUANCE OF
NPDES PERMIT APPROVAL NOS. IN0023183 AND IN0031950
CITY OF INDIANAPOLIS, INDIANA
2003 OEA 037, CAUSE NO. 01-W-J-2815**

Official Short Cite Name:	CITY OF INDIANAPOLIS 2003 OEA 037
OEA Cause Nos	01-W-J-2815
Topics/Keywords:	327 IAC 5-16 through 5-21
	327 IAC 5-16-2
	IC § 4-21.5-3-7(a)(1)327 IAC 2-1-2(2)
	315 IAC 1-3-2(b)(4)(A)
	IC 13-18-15-1
	33 USC §§ 1281(c), 1284(a)(1) and 1251(a)(5)
	Ripeness
	Standing
	Ind. Tr. R. 12(B)(6)
Presiding ELJ:	CANDACE T. VOGEL
Party Representatives:	JANICE SMITH-LENGEL, ESQ., IDEM
	GEORGE W. PENDYGRAFT, ESQ.
	TERRI A. CZAJKA, ESQ.
	ANNE FRYE, ESQ.
	R. MATT SENSENY, ESQ.
	KATHLEEN LUCAS, ESQ.
	S. ANDREW BOWMAN, ESQ.
	JAMES W. CLARK, ESQ.
	MADONNA E. MCGRATH, ESQ.
	ROSEMARY G. SPALDING, ESQ.
	GLENN D. PRATT, <i>pro se</i> .
	MARK SUTTON, <i>pro se</i> .
Order Issued:	AUGUST 15, 2003

Further Case Activity:

withdrew its petition for administrative review. On May 28, 2002, IDEM moved to dismiss CGCU's petition for lack of standing. On July 26, 2002 CGCU filed its Brief in Opposition to IDEM's Motion to Dismiss; IDEM filed its response brief on August 26, 2002. Chief Environmental Law Judge Wayne Penrod issued a Summary Bench Order on March 12 2003 dismissing CGCU from the proceeding for lack of standing. Reilly Industries filed its First Amended Petition for Review on March 31, 2003, well beyond the February 26, 2002 deadline for filing amended petitions. H. H. Sumco has filed no pleadings on its behalf.

On April 23, 2003 the instant cause was assigned to ELJ Candace T. Vogel. The Environmental Law Judge has considered the Petitions and Amended Petitions and **HEREBY FINDS** the following facts most favorable to the non-moving parties:

Facts

1. The Indiana Department of Environmental Management issued National Pollutant Discharge Elimination Permits to the Board of Public Works, City of Indianapolis and its contract operator, the White River Environmental Partnership, for the Belmont (No. IN 0023183) and Southport (No. IN0031950) advanced wastewater treatment plants on October 26, 2001.
2. The Permits require the City to operate an industrial pretreatment program and to maintain adequate authority in its Sewer Use Ordinance to fully implement the pretreatment program in compliance with State and local law.
3. The City shall issue/reissue a pretreatment permit to the Industrial Users that authorizes the discharge of industrial wastewater to the City's AWT plants.
4. The Permits do not specify any terms, local effluent limits, conditions, or other pretreatment standards directly to any industrial user, including CGCU or Reilly Industries.
5. The City, not IDEM, has the authority to issue, set pretreatment standards, and enforce the pretreatment permits per 327 IAC 5-16 through 5-21.

DISCUSSION

The Law

To qualify for administrative review of an agency order, such as the NPDES permits at issue in this cause, a Petitioner must:

- (1) States facts demonstrating that:
 - a. The petitioner is a person to whom the order is specifically directed;
 - b. The petitioner is aggrieved or adversely affected by the order; or
 - c. The petitioner is entitled to review under any law.

IC 4-21.5-3-7 (a).

1

Traditionally, the OEA has required petitioners, such as CGCU and/or Reilly, to establish judicial standing to invoke a court's jurisdiction. The standing requirement is a limit on the court's jurisdiction that restrains the judiciary to resolving real controversies in which the complaining party has a demonstrable injury. *Schloss v. City of Indianapolis*, 553 NE 2d 1204, 1206 (Ind. 1990). An allegation that a party lacks standing is properly filed under the rule governing motions to dismiss for failure to state a claim. *Schulz v. State of Indiana*, 731 NE 2d 1041, (Ind. Ct. App. 2000). OEA views CGCU's and Reilly's allegations of material fact in the light most favorable to CGCU. *Schulz at 1044*.

In determining the standing of a litigant "[A] court will consider: (1) whether the party's complaint falls within the zone of interests protected by the statute in question; (2) whether other governmental institutions are more competent to address the question and (3) whether the plaintiff is asserting his own legal rights and interests instead of relying on the legal rights or interests of third parties." *supra at 1044*, citing *City of Evansville on Behalf of Dep't of Redevelopment v. Reising*, 547 N.E.2d 1106, 1113 (Ind. Ct. App.1989). *trans. denied* (1990). The Industrial Users' complaints only tangentially fall within the zone of interests protected by the Clean Water Act pretreatment program at 40 CFR 403.8. The pretreatment program is intended to beneficially impact the environment and protect the waters of the state; CGCU/Reilly object to the more stringent limitations for cyanide and mercury, in opposition to the interests of the Clean Water Act. Rather, CGCU's and Reilly's interests in the Permits lay in fear of future enforcement actions.

Secondly, IDEM cannot grant the relief that CGCU and Reilly seek since it is the City of Indianapolis, not IDEM, that issues the pretreatment permits to the Industrial Users. The City may issue permits with limits more stringent than those required by the state or the Federal Clean Water Act¹. Even if the OEA granted the CGCU/Reilly Petition and ordered IDEM to so modify the terms of the City's NPDES permit, the City could still issue pretreatment permits to industrial users with more stringent effluent emissions than the Permits require. Finally, CGCU/Reilly are asserting the interests of a third party, the City of Indianapolis, in claiming that the City of Indianapolis will not be able to meet the requirements of the Permits. The doctrine of standing focuses on whether the complaining party is the proper party to invoke the court's power. *Schloss at 1206*. CGCU/Reilly are asserting the issues of a third party, the City of Indianapolis, which, as Permittee, is the only party who may raise the issue of inability to meet its own permit limits. *City of Evansville on Behalf of Dep't of Redevelopment v. Reising*, 547 N.E.2d 1106, 1113 (Ind. Ct. App.1989). *trans. denied* (1990). The City of Indianapolis did not appeal the permit in its behalf.

In a recent decision the Indiana Court of Appeals revisited the subject of standing in an administrative appeal. *Huffman v. Indiana Department of Environmental Management and Eli Lilly and Company*, 788 NE 2d 500; 2003 Ind. App. LEXIS 834. Eli Lilly & Co. were issued a

¹ 327 IAC 5-16-2 Local Authority Sec. 2. Nothing in the pretreatment rules is intended to affect any pretreatment requirements, including any standards or prohibitions, established by local ordinance of any political subdivision of the state as long as the local requirements are not less stringent than any set forth in national pretreatment standards or any other requirements or prohibitions established under the Clean Water Act or the pretreatment rules.

renewal NPDES permit by IDEM for its Greenfield laboratories. Shortly thereafter Huffman filed a petition with the OEA seeking administrative review of the renewal permit. Huffman claimed to qualify for administrative review under the Indiana Administrative Orders and Procedures Act (AOPA) as a person “aggrieved or adversely affected” by IDEM’s order.

Huffman specifically asserted aggrieved status because she had a legal interest in family residential property contiguous to the Lilly property. Lilly moved to dismiss her petition, arguing that she failed to show direct injury under the judicial doctrine of standing. The OEA agreed with Lilly that the proper definition of “aggrieved or adversely affected” was that of the judicial doctrine of standing, i.e. a plaintiff must demonstrate a personal stake in the outcome of the lawsuit and must show that “he or she has sustained or was in immediate danger of sustaining, some direct injury as a result of the conduct at issue” and that Huffman had not met that burden. *Schloss at 1206*. The OEA concluded that Huffman lacked standing under that standard and dismissed her petition.

On appeal, the trial court affirmed the ruling by the OEA. The Court of Appeals, however, applied a different standard for standing under AOPA than that of the judicial doctrine of standing articulated in *Schloss v. City of Indianapolis*, supra. The Court, in *Huffman*, supra, looking at the specific language of IC § 4-21.5-3-7(a)(1), determined that to qualify for administrative review as an ‘aggrieved or adversely affected’ person in an administrative proceeding, one must show “a substantial grievance, a denial of some personal, pecuniary or property rights, or the imposition ... of a burden or obligation”.

Since it is unclear at this writing whether the *Huffman* decision will be further appealed, the OEA will consider IDEM’s Motion to Dismiss OEA under both standards of standing. The Indirect Dischargers have not demonstrated under the judicial doctrine of standing that they have sustained or is in immediate danger of sustaining a direct injury as a result of the issuance of the NPDES permit beyond speculation that the City will issue a pretreatment permit to them with which they will be unable to comply. It would be premature for this court to rule on whether the City will issue pretreatment permits to CGCU with conditions that CGCU will not be able to meet. A petitioner may not overcome a ripeness issue by positing speculative or hypothetical future harm or the fact that it may incur future expense in challenging the regulations in a later permit or enforcement proceeding. *NRDC V. USEPA et al*, 859 F.2d 156, D.C. Cir. (1988). The Indiana Appeals Court has stated “Generally, judicial review is denied for lack of finality if an action by an administrative agency is only anticipated”. *Indiana Alcoholic Beverage Commission v. McShane* 354 N.E.2d 259 (Ind. App. 1976). CGCU is anticipating future noncompliance with pretreatment permits not yet issued by the City.

The OEA has ruled *In the Matter of: Objection to the issuance of Approval No. AW4504 Mr. Stephen Gettelfinger*, 98-S-J-1958, OEA Administrative Decision, Dec. 8, 1998, in dismissing a petition under Trial Rule 12 (B) (6) “that Petitioner’s claims were prospective, and based solely upon speculation that Mr. Gettelfinger may violate the law at some point in the future”. Similarly, CGCU has alleged alternately, that the City will, in the future, violate the Permits, or that CGCU will violate a pretreatment permit issued by the City. The injury complained of is neither actual nor imminent. In the event that the city issues a pretreatment

permit to CGCU with effluent limits or conditions with which CGCU disagrees, the proper remedy at that time is to appeal its pretreatment permit with the city's Department of Public Works.

Nor do the Industrial Users qualify for administrative review as 'aggrieved or adversely affected' persons in an administrative proceeding under the *Huffman* standard where one must show "a substantial grievance, a denial of some personal, pecuniary or property rights, or the imposition ... of a burden or obligation". The NPDES permit has been issued solely to the City of Indianapolis. The permit places no *direct* burden or obligation on the Indirect Dischargers, nor has the permit denied them any pecuniary or property rights. The 'substantial grievance' they raise 'of failure to meet pretreatment permit limits of permit issued by the City' are speculative, at best, and not a direct result of the NPDES permit.

This Court agrees with the IDEM that the cases cited by CGCU to support its position of standing can be distinguished factually from the case at bar. The foreign decisions cited by CGCU are irrelevant and unpersuasive. The Federal cases cited concerned the Federal Removal Credits Program. The District Court denoted in its conclusion that the "plaintiffs, *as indirect dischargers for whose benefit the removal credit program was provided*, (emphasis added) have standing to seek action from the EPA in this matter". *Chicago Association of Commerce and Industry V. USEPA and Thomas*, 873 F.2d 1025, 1031, (7th Cir. 1989). CGCU is not alleging that the pretreatment program of the NPDES permits has been mandated for CGCU's benefit. Quite the contrary, the pretreatment program will assist the City to meet its limits under the permit.

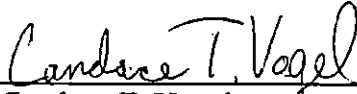
Conclusions of Law:

1. The Office of Environmental Adjudication has jurisdiction over decisions of the Commissioner of the Indiana Department of Environmental Management and the parties to this controversy pursuant to I.C. 4-21.5-7.
2. This is a Final Order issued pursuant to I.C. 4-21.5-27. Findings of fact that may be construed as conclusions of law and conclusions of law that may be construed as findings of fact are so deemed.
3. The Petitions do not state facts demonstrating that the Petitioners are aggrieved or adversely affected by the Order as required by IC 4-21.5-3-7 and 315 IAC 1-3-2.
4. The Petitioners state a set of facts that, even if true, would not support the relief requested in the Petitions.
5. The Petitioners have failed to state a claim upon which relief may be granted by the OEA.
6. The Chamber of Commerce voluntarily withdrew its petition and is hereby dismissed as a party from these proceedings.

7. The Industrial Users, CGCU, H.H. Sumco, and Reilly, are hereby dismissed from these proceedings for lack of standing under Trial Rule 12 (b) (6) and IAC 15-1.

IT IS SO ORDERED THIS 15TH DAY OF AUGUST, 2003 in Indianapolis, IN.

You are further notified that, pursuant to Indiana Code §4-21.5-5, this Final Order is subject to judicial review. Pursuant to Indiana Code §4-21.5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.


Candace T. Vogel
Environmental Law Judge

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Order has been duly served upon each party, attorney of record, or interested person listed below by hand-delivery or by United States Mail, first class, postage prepaid this 15th day of August, 2003.

Janice Smith-Lengel, Esq.
Office of Legal Counsel
Indiana Department of
Environmental Management
100 North Senate Avenue
P.O. Box 6015
Indianapolis, IN 46206-6015

George W. Pendency, Esq.
1000 Waterway Blvd.
Indianapolis, IN 46202

H. H. Sumco
Attn: Mark Sutton
1351 S. Girls School Road
Indianapolis, IN 46231

Terri A. Czajka, Esq.
Ice Miller
One American Square, Box 82001
Indianapolis, IN 46282

Glenn D. Pratt
8460 Spring Mill court
Indianapolis, IN 46260

Anne Frye, Esq.
Chief Counsel
Reilly Industries, Inc.
300 N. Meridian St.
Indianapolis, IN 46204

R. Matt Senseny, Esq.
Office of Corporation Counsel

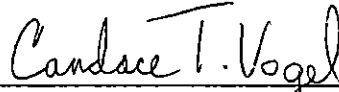
Kathleen G. Lucas, Esq.
Bose McKinney & Evans LLP
2700 First Indiana Plaza
Indianapolis, IN 46204

City of Indianapolis

Rosemary G. Spalding, Esq.
330 S. Downey Avenue
Indianapolis, IN 46219

S. Andrew Bowman, Esq.
Bingham McHale, LLP
1100 Chamber of Commerce Building
320 N. Meridian Street
Indianapolis, IN 46204

James W. Clark, Esq.
Madonna E. McGrath, Esq.
Baker & Daniels
300 N. Meridian Street
Suite 2700
Indianapolis, IN. 46204



Candace T. Vogel
Environmental Law Judge