

**Objections to the Issuance of NSR/PSF/Part 70  
Operating Permit MP/ T033-19475-00092  
Auburn Nugget, LLC Butler, DeKalb County, Indiana  
2005 OEA 47 (05-A-J-3554)**

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**TOPICS:**

union  
representative  
affidavit  
recreate outdoors  
health impacts  
pollution  
environmental degradation  
value of real estate and property  
Motion to Dismiss  
Trial Rule 12(B)(6)  
*Huffman*  
aggrieved or adversely affected  
public harm  
Blue Chip  
organization  
Save the Valley, Inc.  
germane

**PRESIDING JUDGE:**

Daidsen

**PARTY REPRESENTATIVES:**

Permittee: David L. Hatchett, Esq., Thomas W. Baker, Esq.  
Petitioners: Charles L. Berger, Esq.  
IDEM: Matthew A. Gernand, Esq.

**ORDER ISSUED:**

November 8, 2005

**INDEX CATEGORY:**

Air

**FURTHER CASE ACTIVITY:**

[none]

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STATE OF INDIANA            )  
  )  
  )            SS:            BEFORE THE INDIANA OFFICE OF  
COUNTY OF MARION        )                           ENVIRONMENTAL ADJUDICATION

IN THE MATTER OF:                            )  
  )  
OBJECTIONS TO THE ISSUANCE OF           )  
NSR/PSD/PART 70 OPERATING PERMIT     )  
MP/ T033-19475-00092                     )  
AUBURN NUGGET, LLC                       )  
BUTLER, DeKALB COUNTY, INDIANA.       )  
\_\_\_\_\_ )

CAUSE NO. 05-A-J-3554

JOHN HAMPTON and UNITED ASSOCIATION   )  
OF PLUMBERS & STEAMFITTERS,            )  
LOCAL UNION 166,                          )  
    Petitioners,                            )  
AUBURN NUGGET, LLC                       )  
    Respondent/Permittee,                )  
INDIANA DEPARTMENT OF                  )  
ENVIRONMENTAL MANAGEMENT,             )  
    Respondent.                            )

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL ORDER GRANTING  
AUBURN NUGGET'S AND IDEM'S MOTION TO DISMISS PETITIONERS UNITED  
ASSOCIATION OF PLUMBERS & STEAMFITTERS, LOCAL UNION 166;**

**ORDER GRANTING PETITIONERS' UNITED ASSOCIATION OF PLUMBERS &  
STEAMFITTERS, LOCAL UNION 166'S MOTION TO AMEND VERIFIED PETITION  
FOR ADMINISTRATIVE REVIEW;**

and

**ORDER DENYING AUBURN NUGGET'S AND IDEM'S MOTION TO DISMISS  
PETITIONER JOHN HAMPTON**

This matter came before the Court on Respondents Auburn Nugget, LLC’s (“Auburn Nugget”) and the Indiana Department of Environmental Management’s (“IDEM”) Motion to Dismiss filed July 29, 2005. Petitioners United Association of Plumbers and Steamfitters, Local Union 166 (“Union”) and John Hampton (“Hampton”) filed their Response in Opposition to Respondents’ Motion to Dismiss on August 25, 2005, along with a Motion to Amend Verified Petition for Review. Auburn Nugget’s and IDEM’s Response in Opposition to Petitioners’ Motion to Amend Verified Petition for Administrative Review was filed on September 12, 2005 and their

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Reply in Support of Motion to Dismiss was filed on September 16, 2005. Petitioners' Reply in Support of Petitioners' Motion to Amend Verified Petition for Administrative Review was filed on September 23, 2005. The Environmental Law Judge ("ELJ"), having read and considered the Petitions, Motions, and Briefs of the parties, and being duly advised, now makes the following findings of fact, conclusions of law and enters the following final order:

**FINDINGS OF FACT**

1. IDEM issued to Auburn Nugget on May 31, 2005 New Source Review/Prevention of Significant Deterioration/Part 70 Operating Permit No. 033-19475-00092 ("Permit"). The Permit authorizes the construction and operation of an iron nugget production plant at the intersection of County Road 55 and County Road 42 in Butler, DeKalb County, Indiana.
2. On June 15, 2005, the Union and Hampton jointly filed a Verified Petition for Administrative Review and Stay of Effectiveness ("Petition") seeking administrative review of the Permit. Subsequently, the Union and Hampton submitted a proposed Amended Verified Petition for Administrative Review and Stay of Effectiveness ("Amended Petition") on August 25, 2005.
3. For the purpose of ruling on a motion to dismiss, the Office of Environmental Adjudication (OEA) assumes as true facts alleged by the proposed Amended Petition submitted in conjunction with Petitioners' Motion to Amend Verified Petition for Review.
4. The Union submitted the Amended Petition in a representative capacity of several members of the Union, asserting that the members were "aggrieved or adversely affected." In conjunction with the Amended Petition, the Union, by its counsel, submitted twenty-three affidavits of Union members. Each affidavit contains a recitation of the distance of the Union member's residence from the Facility and an indication of the frequency that the Union member drives by the Facility. Each affidavit also alleges that the Union member "spend[s] a good deal of time performing outdoor activities . . . near the area" of the Facility. *See, e.g.,* Aff. T. Cheek ¶ 7. The affidavits also allege that "it is well known that breathing air pollutants in excessive levels damages a person's health and physical well being" and that the affiant will personally suffer health problems from breathing such pollutants. *See, e.g., id.* ¶ 6 and 7. Further, the affidavits stated that each affiant was "not individually represented in this case and [felt] it appropriate, given the Union's function to push for a better quality of life for me and other members, for the Union to represent my interests in this case." *See, e.g., id.* ¶ 12.
5. The Union states in the Amended Petition that its purpose is to be "a representative of construction workers and their families" who "perform plumbing, pipe fitting and steamfitters work, including the type of work necessary to construct the Auburn Nugget iron nugget plant." Am. Pet. ¶ 4.

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6. Petitioner Hampton lives sixteen miles from the Facility. Aff. of J. Hampton ¶ 2. Hampton drives by the Facility two times per month. *Id.* ¶ 7. Hampton's affidavit also includes the same allegations that he recreates outdoors near the Facility and his belief that all persons suffer from health impacts due to pollution and that the affiant will personally suffer health problems from breathing such pollutants. *Id.* ¶¶ 6, 7. Hampton also alleges that environmental degradation "will unnecessarily adversely impact the value of his property and real estate." Am. Pet. ¶ 7.

**CONCLUSIONS OF LAW**

1. Findings of fact that may be construed as conclusions of law and conclusions of law that may be construed as findings of fact are so deemed.
2. OEA has jurisdiction over the decisions of the Commissioner of IDEM and the parties to the controversy pursuant to IND. CODE § 4-21.5-7-3. The Permit constitutes an order pursuant to IND. CODE §§ 4-21.5-3-5 and 13-15-6-1. The Petition for Administrative Review was timely filed in this cause. *Id.*
3. Petitioners' Amended Verified Petition for Administrative Review did not seek to add additional parties, as explicitly stated in the Amended Petition's attached affidavits at ¶ 12. Therefore, the issue as to whether the additional twenty-three affiants whose affidavits were appended to Petitioners' Amended Petition were time-barred is not before this Court. As the Indiana Court of Appeals has instructed OEA to allow a petitioner to conform its petition to the requirements of IND. CODE § 13-15-6-2, *Kunz v. Indiana Office of Environmental Adjudication*, 714 N.E.2d 1190, 1192 (Ind. App. 1999), Petitioners' Motion to Amend Verified Petition for Administrative Review should be granted.
4. This Court must apply a de novo standard of review to this proceeding when determining the facts at issue. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993). Findings of fact must be based exclusively on the evidence presented to the ELJ, and deference to the agency's initial factual determination is not allowed. *Id.*; IND. CODE § 4-21.5-3-27(d). An administrative agency's findings of fact must be supported by substantial evidence. *Huffman v. Indiana Office of Environmental Adjudication, et al.*, 811 N.E.2d 806, 809 (Ind. 2004).
5. "De novo review" means that "all issues are to be determined anew, based solely upon the evidence adduced at that hearing and independent of any previous findings." *Grisell v. Consol. City of Indianapolis*, 425 N.E.2d 247, 252 (Ind. App. 1981). This Court may treat a Motion to Dismiss as a motion to dismiss for failure to state a claim under Ind. Trial Rule 12(B)(6). OEA is guided by the following standard of review in considering a Motion to Dismiss:

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In reviewing a Rule 12(B)(6) motion, a court is required to take as true all allegations upon the face of the complaint and may only dismiss if the plaintiff would not be entitled to recover under any set of facts admissible under the allegations of the complaint. This Court views the pleadings in a light most favorable to the nonmoving party, and we draw every reasonable inference in favor of that party.

*Huffman v. Indiana Office of Environmental Adjudication, et al.*, 811 N.E.2d 806, 814 (Ind. 2004).

6. IND. CODE § 4-21.5-3-7(a)(1) provides that to qualify for administrative review of an agency order, a person must:

State 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.

7. Petitioners are not the persons to whom the order is specifically directed, nor has there been a demonstration or allegation that Petitioners seek review under IND. CODE § 4 21.5-3-7(a)(1)(C). Petitioners' eligibility to seek administrative review in this matter requires that they demonstrate that they are aggrieved or adversely affected as stated in IND. CODE § 4-21.5-3-7((a)(1)(B) by IDEM's issuance of the Permit.

8. The Indiana Supreme Court recently held, in *Huffman v. Indiana Office of Environmental Adjudication, et al.*, 811 N.E.2d 806 (Ind. 2004) that "whether a person is entitled to seek administrative review depends upon whether the person is "aggrieved or adversely affected" . . . and that the rules for determining whether the person has "standing" to file a lawsuit do not apply". *Id.* at 807. The Huffman Court went on to say that in order for a person to be "aggrieved or adversely affected," they "must have suffered or be likely to suffer in the immediate future harm to a legal interest, be it pecuniary, property or personal interest." *Id.* at 810. The Court further interpreted the language of IND. CODE § 4-21.5-3-7 as not allowing administrative review based upon a generalized concern as a member of the public. *Id.* at 812.

Huffman had challenged the issuance of a permit to Eli Lilly and Company to discharge pollutants into Indiana's waters. *Id.* at 806. Huffman owned one unit and was the managing member of the corporation that owned a property adjacent to the property from which the discharge would occur. *Id.* The lower courts dismissed Huffman's objection. *Id.* Huffman alleged that her management duties of the neighboring property required her to be present on the property with frequency, and thus she might be exposed to health risks. *Id.* In response, the permittee alleged that the Huffman property was upstream of the discharge point, and therefore, no impact to Huffman was possible. *Id.* The Indiana Supreme Court ruled that Huffman's dismissal by the lower courts was not supported by

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substantial evidence. *Id.* The single allegation made by Lilly that the property was located upstream was not sufficient to support the dismissal. *Id.* The Court remanded Huffman's case back to OEA to provide Huffman with an opportunity to present additional evidence of her health concerns. *Id.* The Court stated: "Particularly because the OEA never gave Huffman an opportunity to provide additional evidence or to develop the argument more fully, it was impossible for the OEA to tell what Huffman's personal health claim was and whether it had any merit. Dismissing the claim was therefore premature." *Id.* at 815.

9. In *Huffman*, the Indiana Supreme Court specifically rejected the argument that administrative review could be obtained by a petitioner asserting a public harm, stating: "the language of AOPA does not allow for administrative review based on a generalized concern as a member of the public. The statute says 'aggrieved or adversely affected' and this contemplates some sort of personalized harm." *Id.* At 812
  
10. The Respondents' reliance on the decision in *In re Objection to Issuance of Section 401 Water Quality Certification No. 2003-433-46-MTM A Issued to Blue Chip Casino, LLC, Michigan City, La Porte County, Indiana* and *In re Objection to Issuance of NPDES Permit No. IN 0062073 Issued to Blue Chip Casino, LLC, Michigan City, La Porte County, Indiana*, 2004 OEA 109, 2004 IN ENV LEXIS 19 (Nov. 12, 2004) is misplaced. As testimony commenced at the final hearing setting, a party submitted a Motion to Dismiss for the Petitioners' lack of being aggrieved or adversely affected, and the parties elected to proceed with the evidentiary hearing instead of adjourning for briefing and the Court's issuance of a decision on the Motion to Dismiss. *Id.* The Court dismissed this matter only after a two-day hearing during which evidence of the harm allegedly suffered by the Petitioners was introduced. *Id.* After this hearing, the OEA found that the petitioners' claims of economic harm and health threats were "stated in potential, speculative, remote terms" and relied upon "speculative, uncorroborated viewpoints." *Id.* OEA held that the petitioners presented only "subjective speculations about consequences, which if they did occur, were remote to petitioners" and dismissed the petition for failure to demonstrate that the petitioners were "aggrieved or adversely affected." *Id.*, 2004 OEA 109, 120; 2004 IN ENV LEXIS 19, 26-27. Such evidence has not yet been offered in this matter, thus rendering Blue Chip inapplicable to Petitioners' Motion to Dismiss.

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11. As an individual, Petitioner Hampton's pled facts, giving him every reasonable inference, support a conclusion that Hampton is "aggrieved or adversely affected" as required to come before this Court. Although Hampton's residence is sixteen miles away from the Facility, he asserts that he drives "by the area approximately two times per month" and that he "spend[s] a good deal of time performing outdoor activities in DeKalb County." Just as the Supreme Court decided that Ms. Huffman must be given an opportunity to develop the facts to support her allegations, this Court must give Mr. Hampton the same opportunity. While the harm that Petitioner Hampton alleges he will suffer is the same harm that numerous individuals in DeKalb County may suffer, this does not transform the Petitioner's allegations into one of public harm. Mr. Hampton alleges that the harm will be to him and not to the public in general. OEA declines to affix a specific proximity to which a petitioner must be from the Facility in order to qualify for administrative review.
12. The Union, on behalf of several members, also challenges the issuance of a permit to Auburn Nugget. The Union only attempts to establish standing for its Petition through the associational standing doctrine as representative of its members. An organization has only a limited right to seek OEA review on behalf of the members of the organization. *Save the Valley, Inc. v. Indiana-Kentucky Electric Cooperative*, 820 N.E.2d 677, *aff'd on reh'g*, 824 N.E.2d 776 (Ind. App.), *trans. denied*, \_\_\_ N.E.2d \_\_\_, 2005 Ind. LEXIS 760 (Aug. 11, 2005) In order to do so, the organization must provide facts demonstrating that: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Save the Valley*, 820 N.E.2d at 679-80 (quoting *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977)). Each of these elements must be demonstrated to confer "associational standing" upon the Union to bring this Petition.
13. In support of its Amended Petition, the Union provided nearly identical affidavits signed by twenty-three of its members. These affidavits are similar in all respects except that each Union member identifies the distance from their residence to the Facility and the number of times they "drive by the area." *See, e.g.*, Aff. T. Cheek ¶¶ 2, 7. Some of the Union members allege that they live within a mile of the Facility and that they drive by the Facility on a daily basis. These are sufficient allegations to satisfy *Save the Valley's* the first stated element, that an association's members are aggrieved or adversely affected.
14. The Union must also demonstrate that the interests it seeks to protect are germane to the Union's purpose. *Save the Valley*, 820 N.E.2d at 679-80. This requirement most acutely demonstrates the inappropriateness of the Union's attempt to secure associational standing. The Union states in the Petition that its purpose is to be "a representative of construction workers and their families" who "perform plumbing, pipefitting and steamfitters work, including the type of work necessary to construct the Auburn Nugget iron nugget plant" in Butler, DeKalb County, Indiana. Am. Pet. ¶ 4.

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15. Air permitting concerns are not germane to the Union's purpose. In *Save the Valley*, the Court of Appeals found that the environmental concerns expressed in that petition for review were germane to the purposes of the petitioner environmental organizations Save the Valley, Inc., Hoosier Environmental Council, Inc., and Citizens Action Coalition of Indiana, Inc. *Save the Valley*, 820 N.E.2d at 682. The unifying principle of those organizations was to "protect the environment and advance members' interests on energy and utility issues." *Id.* The same cannot be said for the Union. The Union's interest is in representing workers who might be hired to perform work to construct the proposed Facility. It cannot be said that protection of the environment is "central" to the Union's "purpose" as contemplated by the association standing doctrine. *Hunt*, 423 U.S. at 344.
16. Other courts interpreting *Hunt* provide guidance for the germaneness requirement. In *Humane Society of the United States v. Hodel*, 840 F.2d 45, 53-54 (D.C. Cir. 1988), the D.C. Circuit held that the germaneness prong requires that "an organization's litigation goals be pertinent to its special expertise and the grounds that bring its membership together." *Id.* at 56. In this case, the Union's "special expertise" and "the grounds that bring its membership together" are limited to the Union's purpose as alleged in its Amended Petition, namely, "as a representative of construction workers and their families who are employed in the construction trades." Am. Pet. ¶ 4. The "grounds that bring its membership together" are the performance "of plumbing, pipefitting and steamfitters work." *Id.* Even based on inferences of these asserted facts in a light most favorable to the Union, the Union cannot be said to have any expertise – special or otherwise – in the field of environmental protection or environmental permitting.
17. The Union relies on the argument that its purpose is "broader" than the representation of workers and is "relevant" to the litigation. Resp. Br. at 15, 16. However, "to assert that the 'germaneness' requirement can be met by any broad statement of purpose violates the spirit of the rule." *Mountain States Legal Foundation on behalf of Ellis v. Dole*, 655 F. Supp. 1424 (D. Utah 1987). Further, a party's "interest must be directly, not tangentially, related to the subject matter of the lawsuit." *U.S. v. Metropolitan District Commission*, 147 F.R.D. 1, 4-5, 1993 U.S. Dist. LEXIS 2554, 10-11 (D. Mass. Feb 19, 1993). As in that case, the Union's purpose bears only "an oblique relation to the present action." *Id.* If the Union is allowed to establish associational standing in this case, it is unclear how the germaneness prong would ever be given the effect intended by the *Hunt* Court, and courts which have relied upon its authority.



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18. The Union is also not appropriate to represent its members because of the fundamental differences in their concerns. The Union's purpose has no special connection with the general economic well-being of DeKalb County, which is a harm complained of in the Union's Petition. But even if it did, the Union's members cannot individually assert standing on the basis of economic harm. The effects of such a harm are too remote and generalized for the members to assert standing on economic grounds. Thus, even if the Union can establish that its purpose is germane to the economic harms alleged in the Petition, the Union's members cannot individually assert standing on those grounds. Similarly, even if the Union's members can establish individual standing on environmental issues, the Union's purpose is not germane to those alleged environmental harms.
19. In its Amended Petition, the Union asserts that the issuance of the Permit to Auburn Nugget "gives Indiana an unfair advantage over Minnesota in attracting this new source." Am. Pet. ¶ 8(a). However, its Amended Petition also states that the Union's members wish "to maintain a sustainable economy" and "to promote economic development." Am. Pet. ¶ 4. The Union's assertion is in basic conflict with the Union's purpose and plainly stated wishes of its members. "A direct, detrimental effect to some members' interests constitutes a conflict of interest in the associational standing context." *Retired Chicago Police Association v. City of Chicago*, 76 F.3d 856, 864-65 (7th Cir. 1996). And, diminution of property and general economic effects are outside the jurisdiction of OEA, and therefore cannot form a basis for standing in the forum. *In Re: Objection to the Issuance of Solid Waste Facility Permit Alternate Disposal, inc., Lake County, Indiana*, 1997 IN ENV LEXIS 7, 6 (OEA, May 5, 1997); *In Re: Objection to the Issuance of Permit Approval No. 10118 Gary Board of Public Works*, 1997 IN ENV LEXIS 18, 7 (OEA, Sept. 30, 1997). Such an evaluation of the respective regulatory programs in Indiana and Minnesota would be an excessive and impermissible intrusion by the OEA into those states' legislative functions.
20. The Union is not a proper entity to represent its members in an environmental appeal where its members have no interest in the Permit as members of the Union. However, because the Union exists to represent workers in the pipefitting construction trade, and not for an environmental purpose, the Union's interests cannot be said to be "germane" to the subject of the litigation. To hold otherwise would be to ignore the germaneness prong of the *Hunt* test. If the Union were allowed to assert associational standing, OEA cannot identify any organization that would be barred from asserting associational standing in the future. The Union's broad reading of their purpose would eviscerate the germaneness prong, rendering it meaningless. As OEA believes that the Court of Appeals intended for each of the prongs of the *Hunt* test to be satisfied, OEA rejects the Union's broad reading of this requirement. The Union's Amended Petition should be dismissed.
21. For lack of pleading sufficient facts to show that Petitioners are aggrieved or adversely affected by IDEM's issuance of the Permit, Petitioners' Amended Petition for Administrative Review and for Stay of Effectiveness should be dismissed.

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**FINAL ORDER**

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. The August 25, 2005 Motion to Amend Verified Petition for Review filed by Petitioners United Association of Plumbers and Steamfitters, Local Union 166 is GRANTED.
2. Respondents Auburn Nugget, LLC's and the Indiana Department of Environmental Management's Motion to Dismiss is DENIED as to the Petitioner, John Hampton.
3. Respondents Auburn Nugget, LLC's and the Indiana Department of Environmental Management's Motion to Dismiss is GRANTED as to Petitioners United Association of Plumbers and Steamfitters, and the June 15, 2005 Verified Petition for Administrative Review and Stay of Effectiveness and the August 25, 2005 proposed Amended Verified Petition for Administrative Review and Stay of Effectiveness filed by Petitioners United Association of Plumbers and Steamfitters, Local Union 166 is DISMISSED for failure to assert facts to demonstrate that the Petitioners are aggrieved or adversely affected and for failure to state a claim on which relief may be granted.

You are hereby further notified that pursuant to provisions of IND. CODE § 4-21.5-7.5, the Office of Environmental Adjudication serves as the Ultimate Authority in the administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is a Final Order subject to Judicial Review consistent with applicable provisions of IC 4-21.5. Pursuant to IND. CODE § 4-21.5-5-5, 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.

IT IS SO ORDERED THIS 8<sup>th</sup> day of November, 2005.

Hon. Mary L. Davidsen  
Chief Environmental Law Judge