

Objection to Issuance of Section 401 Water Quality Certification
IDEM No. 2014-390-87-DDC-A
Liberty Mine, LLC
Boonville USGS Quad, Warrick County, Indiana
2017 OEA 45, (15-W-J-4850)

OFFICIAL SHORT CITATION NAME: When referring to 2017 OEA 45, cite this case as
Liberty Mine, LLC, 2017 OEA 45.

TOPICS:

Surface coal mining	Depositions
Expansion	Associational Standing
Within boundary	Member aggrieved or adversely affected
Squaw Creek Coal Mine	Recreational use
Water Quality Certification	Dumping
Section 401 U.S. Clean Waters Act, 33	Watch List
U.S.C. §1344	Personalized harm
Section 404	Speculation
Avoided Areas	Required entry
Pollutant discharge	Legal interest
Public hearing comments	Hearsay
Fail to serve	I.C. § 4-21.5-3-7(a)(B)(1)
Letter	I.C. § 4-21.5-3-23
Petition for administrative review	I.C. § 13-13, <i>et seq.</i>
Aggrieved or adversely affected	I.C. § 13-15-6-2, -3
Standing	315 IAC 1-3-2(b)
Non-profit environmental organization	315 IAC 1-3-7
Specific members	327 IAC 2, <i>et seq.</i>
Summary judgment	<i>Indiana-Kentucky Electric Corp. v. IDEM</i> , 820 N.E.2d 677 (Ind. Ct. App. 2005)
Cross motion	<i>Huffman v. Indiana Office of Environmental</i> <i>Adjudication et al.</i> , 810 N.E.2d 806 (Ind. 2004)
Sufficient evidence	Ind. Tr. R. 56 (C), (E)
Affidavit	Indiana Evidence Rules 701, 802, 1002
Personal knowledge	
Admissible facts	
Designated evidence	
Discovery	

PRESIDING JUDGE: Mary L. Davidsen

PARTY REPRESENTATIVES:

IDEM: Sierra L. Alberts, Esq.
Petitioners: Kim E. Ferraro, Esq.; Hoosier Environmental Council
Nathaniel Shoaff, Esq.; Sierra Club
Jessica A. Dexter, Esq., Lindsay P. Dubin, Esq., Environmental Law and Policy
Center
Respondent: David R. Joest, Esq.; Bingham Greenbaum Doll, LLP
E. Sean Griggs, Esq.; Barnes & Thornburg, LLP

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ORDER ISSUED:

April 18, 2017

INDEX CATEGORY:

Water

FURTHER CASE ACTIVITY:

Judicial Review: *Hoosier Environmental Council, Sierra Club, Petitioners, v. Indiana Department of Environmental Management, Indiana Office of Environmental Adjudication, Liberty Mine, LLC., Marion County Superior Court, Cause No. 49D11-1705-MI-020085. The Court Granted the Motion to Dismiss on July 10, 2017.*

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operation on a site contained on the Boonville USGS Quad map in Warrick County, Indiana (“Site”). IDEM’s WQC authorized Permittee Liberty Mine to mine approximately 656 acres of land to recover coal reserves. Upon completion of coal extraction, the area will be returned to the approximate original contours in accordance with the approved modified Surface Mining Control and Reclamation Act (SMCRA) Permit Number S-00366-1. The mining operations will adversely impact approximately 3,028 linear feet of intermittent streams, 20,007 linear feet of ephemeral streams, 2.8 acres of forested wetlands, 0.6 acre of scrub-shrub wetlands, 26.8 acres of emergent wetlands and 3.8 acres of palustrine unconsolidated bottom wetlands and 30 acres of open water. As compensatory mitigation for stream impacts, the on-site and off-site stream mitigation must total 6,549 linear feet. Specifically, you will create 1,204 linear feet of ephemeral streams and 946 linear feet on intermittent streams on-site, and 4,399 linear feet of intermittent streams off-site. As for compensatory mitigation for wetland impacts, the on-site and off-site wetlands mitigation must total 75.5 acres. Specifically, you will create 16 acres of forested wetlands on-site and 58.5 acres of forested wetlands and one acre of palustrine unconsolidated bottom off-site. Open water impacts will be offset with the onsite creation of 30 acres of open water. *Section 401 Water Quality Certification, Petitioners’ February 24, 2016 Amended Petition for Administrative Review, Ex. A, p. 1; Affidavit of Alex Messamore, October 21, 2016 Appendix to Respondent Liberty Mine, LLC’s Motion for Summary Judgment on Issue of Petitioner’s Standing, Tab D.*

2. IDEM issuance of a Sec. 401 WQC is required before the U.S., Army Corps of Engineers (“Corps”) may issue a Sec. 404¹ permit before Liberty Mine can expand surface coal mining and reclamation. In each Sec. 401 WQC, IDEM must certify that Sec. 404 discharge will comply with Indiana’s Water Quality Standards stated in 327 IAC 2, *et seq.*, and in applicable provisions of sections 301, 302, 303, 306 and 307 of the federal Clean Water Act. 33 U.S.C. § 1341(a)(1).²
3. The Site is situated entirely within the boundary of the former (inactive) Squaw Creek Coal Mine. *Petitioners’ November 21, 2016 Brief in Support of Petitioners’ Cross Motion for Partial Summary Judgment on Standing and Response to Respondent Liberty Mine, LLC’s Motion for Summary Judgment on Issue of Petitioners’ Standing (“Petitioner’s Cross Motion and Brief”), p. 1.*^{3,4}

¹ Clean Water Act, Sec. 404 of 33 U.S.C. §1344.

² Petitioners summarize Sec. 401 and Sec. 404 Clean Water Act general provisions and interrelationships in their December 11, 2015 Petition for Administrative Review, p. 4, 5, ¶¶ 9 – 14, and in their February 24, 2016 Amended Petition for Administrative Review, p. 4, 5, ¶¶ 9 – 15, which petitions are substantially similar to each other. Therefore, this Order will cite to the February 24, 2016 Amended Petition.

³ The second page of Petitioners’ Brief is labelled as page 1. For citation purposes, the Court will refer to the page numbers stated on the brief, instead of the brief’s actual page numbers.

⁴ In their Brief, Petitioners assert that Permittee is in accord with this statement concerning the mining Site, referencing Respondent Liberty Mine, LLC’s October 21, 2016 Memorandum of Law in Support of (its) Motion for summary Judgment on Issue of Petitioners’ Standing, p. 6, n. 10, which cites instead to legal authority applicable to aggrieved or adversely affected status. The correct citation is at p. 7, n. 11.

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4. In their Amended Petition, Petitioners state that prior to IDEM’s issuance of the WQC in controversy, Permittee Liberty Mine was issued IDEM’s Sec. 401 WQC 2010-362-87-DDC-A, followed by an April, 2012, Corps Sec. 404 Permit LRL-2010-218 (“2012 Permit”) which required Liberty Mine to avoid certain areas near the mining operation (“Avoided Areas”). *Amended Petition, p. 6, §§ 16 – 19.* Petitioners further state that the WQC in controversy in this case would allow mining in the Avoided Areas. *Id., p. 6, § 20.*
5. Petitioners, by Indiana legal counsel, joined⁵ in filing a timely Petition for Administrative Review on December 11, 2015. Petitioners’ February 24, 2016 Amended Petition for Administrative Review was timely filed per the Court’s January 26, 2016 Report of Prehearing Conference and Case Management Order.
6. Prior to IDEM’s issuance of the WQC, Petitioners submitted oppositional comments to IDEM during public hearing. *Amended Petition, p. 7, 8, §§ 21 – 26.*
7. Stating that IDEM disregarded Petitioners’ public hearings comments, Petitioners’ challenges to Permittee Liberty Mine’s WQC are, in sum:
 - The WQC is contrary to law and IDEM’s internal policies, and should be vacated, because IDEM failed to adequately consider all relevant factors, including the known existence of hazardous substances and the 2012 designation of Avoided Areas. *Id., p. 9, §35.*
 - The WQC is inconsistent with the Clean Water Act and 327 IAC 2’s Water Quality Standards in ways including:
 - Failure adequately consider practicable alternatives or the need for the proposed activity;
 - Failure to require sufficient mitigation measures;
 - Failure to require Permittee Liberty Mine to address issues related to the Avoided Areas and the known hazardous materials in the area to be mined;
 - Failure to ensure that the discharge will not cause or contribute to a violation of water quality standards; and
 - Failure to require Permittee Liberty Mine to comply with Indiana’s Antidegradation Standards and Implementation Procedures, 327 IAC 2-1.3. *Amended Petition, p. 9, 10, §36.*
8. Petitioner Sierra Club states that it:

“is the nation’s oldest grassroots environmental non-profit organization, with more than 600,000 members nationwide, including over 8,000 in Indiana and 63 in Warrick County. Sierra Club’s mission is to explore, enjoy, and protect the wild places of the

⁵ All of Petitioners’ filings have been joint; the petition for review specifies when facts are unique to a specific Petitioner.

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earth and educate and enlist humanity to protect and restore the quality of the natural and human environment. Since its founding over a century ago, Sierra Club has become a national leader in working to reduce water pollution.”

Id., p. 2, ¶ 1.

9. Petitioner Hoosier Environmental Council (“HEC”), “founded in 1983, is Indiana’s largest state-wide, non-profit environmental organization working to make Indiana a better place to live, breathe, work and play. HEC engages in, and advances, public education efforts with respect to preservation, protection, conservation, and recovery of nature, natural habitats, and the natural environment; promotes human and environmental health by advancing sustainable communities as well as healthy, clean, and safe environmental conditions; preserves and restores land areas for outdoor recreation by, or the education of, the general public; works to protect and create relatively natural habitats of fish, wildlife, plants, and similar natural ecosystems; seeks to preserve and maintain open spaces for the scenic enjoyment of the general public or pursuant to clearly delineated Federal, State, or local government conservation or mitigation polices. HEC regularly institutes and/or maintains environmental litigation to further its mission.

...

As part of HEC’s interest in ensuring overall protection of Indiana’s environment, the organization has an interest in ensuring the proper implementation of federal and state environmental laws. HEC works to monitor coal mining operations in Indiana, and where necessary to protect impacted communities and the environment on which they rely, HEC utilizes all means afforded by law to bring these operations into compliance with applicable environmental statutes.

Id., p. 2, 3, ¶¶ 3, 4.

10. Petitioners did not identify specific members in their Amended Petition for Administrative Review.
11. The parties, by legal counsel, engaged in discovery. Petitioners and Permittee Liberty Mine filed motions and supporting briefs on summary judgment (and subsequent responses and replies), challenging whether Petitioners were aggrieved or adversely affected. *Permittee Liberty Mine’s Motion and Brief; Petitioners’ Cross Motion and Brief*. IDEM did not participate in summary judgment.
12. Permittee Liberty Mine also filed a Motion to Strike Petitioners’ Cross Motion and supporting brief, and a Motion to Strike Portions of the Affidavit of Bil Musgrave. Separate orders issued concerning these motions to strike. The Court elected to address its rulings on the Motion to Strike Portions of the Affidavit of Bil Musgrave in this Order.

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13. Permittee Liberty Mine's October 21, 2016 Motion for Summary Judgment on Issue of Petitioners' Standing, and supporting brief, contained an appendix with the following evidence:
- Respondent Liberty Mine, LLC's First Set of Requests for Admission, Interrogatories, and Requests for Production to Petitioners;
 - Petitioners' Responses to Respondent Liberty Mine, LLC's First Set of Requests for Admission, Interrogatories, and Requests for Production;
 - Deposition of Billy L. Musgrave, Jr. on oral examination, September 12, 2016 ("Musgrave Deposition");
 - Affidavit of Alex Messamore ("Messamore Affidavit").
14. Permittee Liberty Mine designated the following evidence in support of its Motion for Summary Judgment:
- Petitioners' Answers to Respondent Liberty's Interrogatories Nos. 6 and 7 (Appendix, tabs A and B);
 - Deposition of Billy L. Musgrave, Jr., on oral examination, conducted September 12, 2016 (Appendix, tab C); and
 - Affidavit of Alex Messamore (Appendix, tab D).
15. Petitioners supported their November 21, 2016 Cross-Motion for Partial Summary Judgment and supporting Brief with the following evidence:
- Exhibit A: a copy of *Musgrave v. Department of Natural Resources*, Indiana Natural Resources Comm'n, Findings of Fact, Conclusions of Law with Final Order, Administrative Cause No. 08-034R (Bond Release S-0008) (Dec. 28, 2009); and
 - Exhibit B: Affidavit of Bil Musgrave (Nov. 18, 2016) ("Musgrave Affidavit");
 - Exhibit C: a copy of *Natural Res. Def. Council v. IDEM*, Objection to the Issuance of National Pollution Discharge Elimination System Permit No. IN0001759 to Indiana-Kentucky Electric Corporation Clifty Creek Plant, Cause No. 12-W-J-4541, Findings of Fact and Conclusions of Law (Aug. 22, 2012).
16. In the Amended Petition, Petitioners assert their aggrieved or adversely affected status as follows: "Petitioners, by and through their members, are aggrieved and adversely affected by the 401 Certification because of the adverse impact to the waters of the State and of the U.S." *Id.*, p. 9, ¶33. Petitioners allege that each Petitioner "has members who live, work and recreate in and around Warrick County who will be aggrieved and adversely affected by the adverse impact to waters of the State and U.S. in Warrick County that the 401 Certification authorizes. The adverse impact and discharge of pollutants authorized by the 401 Certification will increase the level of pollutants in the water that is used and enjoyed by such members. *Id.*, p. 2, ¶2 (*re: Petitioner Sierra Club*), p. 3, ¶5 (*re: Petitioner HEC*).

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17. In response to interrogatories, Petitioners identified the WQC-area “waters used and enjoyed by such member which will be adversely affected” as Squaw Creek, Pigeon Creek and the Ohio River (waters flow from Squaw Creek, through Pigeon Creek, to the Ohio River). *Petitioners’ Responses to Respondent Liberty Mine’s First Set of Interrogatories, Requests for Admission and Requests for Production, Interrogatory Answers Nos. 6. a-d, 7. a-d, Appendix, Tabs A, B. (“Interrogatory Responses”)*. The uses of such water: fishing, boating, recreating. *Id.*
18. In response to interrogatories, Petitioners identified Bil Musgrave (a common member) as the “members” referenced in their Amended Petition. Bil Musgrave is the same person as Billy L. Musgrave, Jr., whose September 12, 2016 deposition is attached to Permittee Liberty Mine’s summary judgment brief as Tab C, and whose November 18, 2016 affidavit is attached to Petitioner’s cross motion and brief as Ex. B. Both parties relied on Mr. Musgrave’s affidavit and deposition in support of their respective motions for summary judgment.
19. Petitioners replied that “any physical harm or injury to pecuniary, property or legal interest such member has suffered or will suffer as a result of” the WQC, was that Mr. Musgrave would suffer “recreational and aesthetic injuries”. *Id., Nos. 6. e, 7.e, Appendix, Tabs A, B.*
20. In his affidavit in support of his aggrieved or adversely affected status, Mr. Musgrave stated that he has (along with family, friends, fellow miners and local residents) “a unique understanding of the area and the issues at stake in approving this additional acreage to Liberty Mine.⁶ He is president of a volunteer fire department whose response area includes the Squaw Creek Mine area.⁷ He has survived rare bile duct cancer, has had skin cancer twice, recently started treatment for colon cancer, and knows of two miners with similar mining jobs who did not survive cholangiocarcinoma.⁸
21. As for toxic substances in the Site, Mr. Musgrave stated that he has “knowledge and documentation from Alcoa that the operators of Squaw Creek Mine . . . dumped massive amounts hazardous wastes from a nearby Alcoa aluminum smelting plant into portion of the Squaw Creek Mine throughout 1960s and 1970s.⁹ Mr. Musgrave stated that he has “many concerns about the harmful impacts of allowing Liberty to mine through areas that likely contain wastes dumped from the Alcoa facility:¹⁰

⁶*Petitioners’ Brief, Affidavit of Bil Musgrave, Ex. B, p. 1, ¶ 2.* Permittee Liberty Mine moved to strike this statement. Permittee Liberty Mine’s December 12, 2016 Motion to Strike Portions of Affidavit of Bil Musgrave, p. 1, ¶1,

⁷ *Affidavit of Bil Musgrave, p. 1, ¶3.*

⁸ *Id., p. 3, ¶10.*

⁹ *Id., p. 2, ¶ 5, subject of Permittee Liberty Mine’s Motion to Strike, p. 2, ¶2.*

¹⁰ *Id., p. 3, ¶ 12.*

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“These wastes included hexavalent chromium and coal tar pitch, along with a long list of other very hazardous chemicals. Alcoa’s own public documents state that over 65 million gallons of toxic coal tar wastes, hundreds of thousands of tons of spent pot lining, and millions of cubic feet of chromium sludge were also dumped at the mine.”¹¹

...

“Many former miners have stated that they either participated in, or were told to participate in by the bosses at the mine, or were aware of these dumping practices. Some of the miners gave sworn deposition testimony, and others spoke at the public meeting held at the Boonville Public library”¹²

...

“Some of the areas where hazardous materials were dumped have been set aside under environmentally restricted covenants by Alcoa due to testing showing chemicals over the Industrial Default Closure level. Former Squaw Creek Miners have testified under oath in a legal proceeding that they witnessed dumping of wastes at the Alcoa Mine, and some of those areas they identified are going to be re-mined by Liberty Mine as a result of IDEM’s issuance of the water quality certification challenged here. The surface drainage runoff run through part of these environmental restrictive covenant areas and end up as surface water drainage into Squaw Creek.”¹³

22. In his Affidavit, Mr. Musgrave stated:

“Liberty Mine contains what is perhaps Indiana’s second largest population of Henslow’s Sparrow, a Watch List species and one of great global conservation concern. In all, more than 200 pairs of this endangered bird likely breed her according to the Audobon Society. The Dickcissel, another Watch List species and one which is dependent on grassland habitat during the nesting season, is especially abundant in this area, with some estimates putting the number at several hundred breeding pairs.”¹⁴

23. When deposed on September 12, 2016, Mr. Musgrave testified that he joined Sierra Club and HEC in 2012, and believed he was still a member. ¹⁵

24. During Mr. Musgrave’s pre-retirement employment by Squaw Creek Coal Company, at Squaw Creek Mine (now, closed and inactive), he was permitted recreational use on inactive areas of the mine.¹⁶ Permittee Liberty Mine occupies part of the old Squaw Creek Mine area.¹⁷ Mr. Musgrave testified that between 1965 and 1999, he enjoyed using the Squaw

¹¹*Id.*, p. 2, ¶ 6, subject of *Permittee Liberty Mine’s Motion to Strike*, p. 2, ¶3.

¹²*Id.*, p. 2, ¶ 7, subject of *Permittee Liberty Mine’s Motion to Strike*, p. 2, ¶4.

¹³*Id.*, p. 3, ¶ 11, subject of *Permittee Liberty Mine’s Motion to Strike*, p.3, ¶65

¹⁴*Id.*, p. 4, ¶17, subject of *Permittee Liberty Mine’s Motion to Strike*, p. 2, ¶3.

¹⁵*Musgrave Dep.*, p. 19, Line 23.

¹⁶*Id.*, p. 23, lines 9 – 13.

¹⁷*Id.*, p. 22, line 15 – p. 23, line 1; p. 37, line 19 – p. 40, line 22. See also *Messamore Affid.*, Appendix, Tab D.

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Creek Mine area, as often as twice a week, for recreational activities including: fishing, hiking, camping, sunbathing, mushroom hunting, firewood gathering and dumping of personal trash.¹⁸ At some time between 2000 and 2012, Mr. Musgrave quit recreational use of this area when he learned that toxic waste had been disposed there.¹⁹ *See also Petitioner's Brief, Ex. C.*²⁰

25. Mr. Musgrave does not own, lease or have a unique possessory interest in the real estate containing the Site, and has no permission from any land owners to enter the Site, other than to access a public cemetery.²¹ Currently, Mr. Musgrave enjoys driving by the area observing birds, wildlife and scenery²² and “nature generally”.²³ As for his use of Squaw Creek, Mr. Musgrave does not fish or boat in Squaw Creek. Mr. Musgrave occasionally fishes in Pigeon Creek²⁴ from road bridges on Heim Road and Boonville-New Harmony Road.²⁵ As for his use of the Ohio River, Mr. Musgrave could not specify when he last fished in the Ohio River.²⁶ He no longer boats on the Ohio River because he no longer has a boat in the area.²⁷ He is concerned that mining activity contemplated in the WQC may cause roads to be closed that would prevent him from viewing the birds and wildlife,²⁸ transportation,²⁹ and public safety.³⁰

26. As for the personal impact he would incur from the permitted activity, Mr. Musgrave testified³¹ that as for “what are you not going to be able to do anymore that you could do before?”,

“Well, I’m not sure that anybody can answer that, because in sworn depositions of former miners, the area of expansion that Liberty Mine wants to expand into, the previously mined areas of Squaw Creek was testified to by miners that – and it was before my employment at Squaw Creek – testified to, older miners, that the chemicals, toxic waste from Alcoa was dumped in that area.

...

So whenever that it disturbed, I would say the whole water supply, if not at risk already, through surface and subsurface pathways would be at risk.”

¹⁸ *Id.*, p. 37, lines 7 – 18; p. 35, line 24 – p. 37, line 3; p. 62, lines 3 -5; for map of areas used, see *Dep. Ex. 5*.

¹⁹ *Id.*, p. 61, line 24 – p. 62, line 2; p. 46, lines 24 – 25; p. 49, lines 18 - 24.

²⁰ Petitioners’ Brief, Ex. C, indicates that Mr. Musgrave was party to an administrative case before the Indiana Natural Resources Commission involving allegations that hazardous wastes were placed within or near the Site.

²¹ *Musgrave Dep.*, p. 52, lines 12 – 19.

²² *Id.*, p. 50, lines 2 – 7.

²³ *Id.*, p. 32, lines 8 – 14.

²⁴ *Id.*, p. 13, lines 22 –24.

²⁵ *Id.*, p. 29, lines 5 –12. [/ 30, lines 15 – 25.

²⁶ *Id.*, p. 25, lines 7 – 13.

²⁷ *Id.*, p. 13 lines 18–24.

²⁸ *Id.*, p. 54, lines 6 – 9.

²⁹ *Id.*, p. 50, lines 2 – 18.

³⁰ *Id.*, p. 50, lines 7 – 18, p. 55, lines 6 - 10.

³¹ *Id.*, p. 60, line 10 – p. 61, line 14.

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Mr. Musgrave further testified that he was not referring to a specific water supply, but to “the public waterways that anybody can use and also the watershed areas into those waterways”, but could not answer whether he was referring to drinking water supply.³²

27. As for the scope of the injuries Mr. Musgrave alleges, when asked whether the proposed mining would cause him any unique injury, he stated that “everybody will be affected.”³³ He believes he will not be the only person to suffer recreational or aesthetic injuries.³⁴ “My concern of the Liberty Mine expansion is the things it can affect: Myself, my family, my community, my friends, and the fire department and public service agencies that provide emergency services to Warrick County”.³⁵
28. Mr. Musgrave specified that the community he “refers to specifically” is Warrick County and the watershed areas and the downstream areas that flow from the Liberty Mine expansion area to the Ohio River, which then flows to the Mississippi River. All of those people I feel like could be affected.”³⁶

CONCLUSIONS OF LAW

1. The Indiana Department of Environmental Management (“IDEM”) is authorized to implement and enforce specified Indiana environmental laws, and rules promulgated relevant to those laws, per I.C. § 13-13, *et seq.* Petitioners Sierra Club and Hoosier Environmental Council, by legal counsel, timely filed their petition for administrative review. The Office of Environmental Adjudication (“OEA” or “Court”) has jurisdiction over the decisions of the Commissioner of IDEM and the parties to this controversy pursuant to I.C. § 4-21.5-7, *et seq.*
2. 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 OEA 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 environmental law Judge (the “ELJ”), and deference to the IDEM’s initial factual determination is not allowed. *Id.*; I.C. § 4-21.5-3-27(d).
4. OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Envntl. Adjud.*, 811 N.E.2d 806, 809 (Ind. 2004)(appeal of OEA review of NPDES permit); *see also* I.C. § 4-21.5-3-27(d). “Standard of proof generally has been described as a continuum with levels ranging from a “preponderance of the evidence test” to a “beyond a

³² *Id.*

³³ *Id.*, p. 67, lines 9 – 19.

³⁴ *Id.*, p. 63, lines 14 – 17.

³⁵ *Id.*, p. 68, lines 21 – 25.

³⁶ *Id.*, p. 69, lines 4 – 8.

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reasonable doubt” test. The “clear and convincing evidence” test is the intermediate standard, although many varying descriptions may be associated with the definition of this intermediate test.” *Matter of Moore*, 453 N.E.2d 971, 972, n. 2. (Ind. 1983). The “substantial evidence” standard requires a lower burden of proof than the preponderance test, yet more than the scintilla of the evidence test. *Burke v. City of Anderson*, 612 N.E.2d 559, 565, n.1 (Ind. Ct. App. 1993). *Gas America* 347, 2004 OEA 123, 129. *See also Blue River Valley*, 2005 OEA 1, 11-12. *Objection to the Denial of Excess Liability Trust Fund Claim Marathon Point Service, ELF #9810570/FID #1054, New Castle, Henry County, Indiana; Winimac Service, ELF #9609539/FID #14748, Winimac, Pulaski County, Indiana; HydroTech Consulting and Engineering, Inc.*, 2005 OEA 26, 41.

5. The OEA shall consider a motion for summary judgment “as would a court that is considering a motion for summary judgment filed under Trial Rule 56 of the Indiana Rules of Trial Procedure.” I.C. § 4-21.5-3-23. Although “a party may make a summary judgment motion “with or without supporting affidavits”, Tr. R. 56(c), Trial Rule 56 provides, “The judgment sought shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”

6. The moving party bears the burden of establishing that summary judgment is appropriate. All facts and inferences must be construed and issues of doubt resolved by the court in the fashion most favorable to the non-moving party. *City of Indianapolis v. Buschman*, 988 N.E.2d 791 (Ind. 2013) *see also Town of Avon v. W. Cent. Conservancy Dist.*, 957 N.E.2d 598, 602 (Ind. 2011), *Gibson v. Evansville Vanderburgh Building Commission, et al.*, 725 N.E.2d 949 (Ind. Ct. App. 2000). After the burden of proof regarding summary judgment has been established by the moving party, the burden shifts to the non-moving party to demonstrate through specific evidence that there lies a genuine issue of material fact. *Bushong* at 474, (2003). “[I]t is well-settled that speculation may not be used to manufacture a genuine issue of fact.” *Amadio v. Ford Motor Co.*, 238 F.3d 919, 927 (7th Cir. 2001); *see also Borcky v. Maytag Corp.*, 248 F.3d 691, 695 (7th Cir. 2001) (“The mere existence of some alleged factual dispute will not defeat an otherwise properly supported motion for summary judgment Speculation will not suffice.”). Still, the trial court’s decision will be assessed to ensure that the non-movant was not improperly denied his or her day in court. *Alexander v. Marion Cnty. Sheriff*, 891 N.E.2d 87, 92 (Ind. Ct. App. 2008) (quoting *City of Mishawaka v. Kvale*, 810 N.E.2d 1129, 1132-33 (Ind. Ct. App. 2004)), *trans. denied*. “We may affirm the grant of summary judgment on any basis argued by the parties and supported by the record.” *CFS, LLC v. Bank of Am.*, 962 N.E.2d 151, 153 (Ind. Ct. App. 2012). While Petitioners correctly assert that AOPA does not require them to submit affidavits, “Summary judgment shall not be granted as of course because the opposing party fails to offer opposing affidavits or evidence but the court shall make its determination from the evidentiary matter designated to the court.” T.R. 56(C).

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7. Both Petitioners and Respondent Liberty Mine have requested summary judgment. “The fact that both parties requested summary judgment does not alter our standard of review. Instead, we must separately consider each motion to determine whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law.” *Laudig v. Marion County Bd. of Voters Registration*, 585 N.E.2d 700, 703-704, (Ind. Ct. App. 1992); *see also Five Star Concrete, L.L.C. v. Klink, Inc.*, 693 N.E.2d 583, 585 (Ind. Ct. App. 1998).
8. Here, Petitioners’ challenge to IDEM’s issuance of Permittee Liberty Mine’s WQC raise issues within OEA’s subject matter jurisdiction. But, for OEA to acquire personal jurisdiction, Petitioners must satisfy I.C. § 4-21.5-3-7(a)(1)(B)’s requirement for aggrieved or adversely affected status or suffer dismissal.
9. In this case, Petitioners claim that they have members who are aggrieved or adversely affected by IDEM’s issuance of the WQC. An association may seek administrative review on behalf of its members’ interests when:
 - 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 sought requires the participation of the individual members in the lawsuit.”

Indiana-Kentucky Electric Corp. v. IDEM, 820 N.E.2d 677, 679 – 690 (Ind. Ct. App. 2005) (“*Save the Valley I*”), *adopting Hunt v. Washington State Apple Advertising Comm’n*, 432 U.S. 333, 344, 97 S.Ct. 2434, 2442, 53 L.Ed.2d 383 (1977); *See also Save the Valley v. Indiana-Kentucky Electric Corp.*, 824 N.E.2d 776 (Ind. Ct. App. 2005).
10. As Petitioners identify the same member, Mr. Musgrave, he must qualify to seek administrative review in his own right for the Petitioners to gain associational standing to seek administrative review of the WQC issued to Liberty Mine on behalf of their “members” interests.
11. Aggrieved or adversely affected status before AOPA agencies, generally, and OEA, specifically, is controlled by the Indiana Supreme Court’s ruling in *Huffman v. Indiana Office of Environmental Adjudication, et al.*, 811 N.E.2d 806 (Ind. 2004)(“*Huffman*”). The *Huffman* Court addressed the definition of “aggrieved or adversely affected” as stated in I.C. § 4-21.5-3-7(a)(1)(B). Huffman had challenged the issuance of a permit to Eli Lilly and Company to discharge pollutants into Indiana’s waters. Huffman owned the corporation that had one unit of and was the managing member of the corporation that owned a property adjacent to the property from which the discharge would occur. The lower courts dismissed Huffman’s objection to the issuance of the permit because of a lack of factual support for the allegations that Huffman or the property might be harmed. In oral argument before the Indiana Supreme Court, Huffman alleged that her management duties of the neighboring property arising from Huffman’s LLC interest required her to be present on the property with

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frequency, and thus she might be exposed to health risks not addressed by the permit issued by IDEM. In response, the permittee alleged that due to the downstream location of the discharge point, no impact to Huffman was possible. Huffman's petition was challenged by a motion to dismiss supported by facts outside Huffman's pleadings, and thus was required to be treated by the Court as a Motion for Summary Judgment. The Indiana Supreme Court ruled that Huffman's dismissal by the lower courts was not supported by substantial evidence. *Objection to the Issuance of Hazardous Waste Permit No. INR000128975 ShoreMet, LLC Nabb, Scott County, Indiana* 2016 OEA 18, (14-S-J-4755) 2016 OEA 18, 23.

12. The *Huffman* Court held 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” and further found that “imposition of the "judicial doctrine of standing" inappropriate here because AOPA itself identifies who may pursue an administrative proceeding.” *Huffman* at 809.
13. The *Huffman* Court held that “[E]ssentially, to be "aggrieved or adversely affected," a person must have suffered or be likely to suffer in the immediate future harm to a legal interest, be it a pecuniary, property, or personal interest.” The Court defined “aggrieved” as “[A] substantial grievance, a denial of some personal or property right or the imposition upon a party of a burden or obligation. . . The appellant must have a legal interest which will be enlarged or diminished by the result of the appeal.” *Huffman* at 810.
14. The *Huffman* Court further interpreted the language of I.C. § 4-21.5-3-7(a)(1)(B) as not allowing administrative review based upon a generalized concern as a member of the public.
15. The Court remanded Huffman's case back to OEA to provide Huffman with an opportunity to present additional evidence of her health concerns and Site access. “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.
16. In this case, Petitioners’ opportunity to present additional evidence was present from pre-dismissal litigation tasks *not* pursued by Ms. Huffman: discovery, including interrogatories, requests for production, a deposition of Mr. Musgrave, and summary judgment briefing.
17. The recreation and aesthetic injuries Petitioners assert for Mr. Musgrave constitute legal interests whose adverse enlargement or diminution can determine whether he is aggrieved or adversely affected. Mr. Musgrave alleges that his diminished enjoyment of fishing and viewing wildlife is “likely” or “might” occur *if* pollutants are in certain Site locations, *if* mining occurs in locations where Mr. Musgrave believes pollutants *might* be placed, or *if* pollution migrates from the Site. “[T]he concept of “aggrieved” is more than a feeling of concern or disagreement with a policy; rather it is a personalized harm”. *Huffman* at 812.

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However, Mr. Musgrave has not supported his allegations with any evidence as to that he “must have suffered or be likely to suffer in the immediate future” from the permitted discharge levels’ impact on the fish and wildlife he enjoys, nor at the different points in the watershed he identifies. Clearly, Mr. Musgrave is concerned about his future use, and bases his concerns on his speculation that the environment he enjoys, and which he believes may have harmed his health.

18. Petitioners fail to support their contentions with sufficient evidence probative of Mr. Musgrave’s aggrieved or adversely affected status so as to succeed on their cross motion for summary judgment. “[I]n order for the Environmental Law Judge to consider evidence attached to the motion for summary judgment, the evidence must be admissible.” *Rowe Brothers, Inc.*, 2007 OEA 94, 101, *citing Medora Sanitary Landfill*, 2006 OEA 35, 38. Petitioners supported their November 21, 2016 cross motion for summary judgment with Ex. A, a copy of *Musgrave v. Department of Natural Resources*, Indiana Natural Resources Comm’n, Findings of Fact, Conclusions of Law with Final Order, Ex. B, Mr. Musgrave’s November 18, 2016 affidavit, and Ex. C, a copy of an administrative decision before this forum. Ex. C did not include factual evidence, but was provided as a convenient source of legal authority. Ex. A provides the Court with some evidence in support of Mr. Musgrave’s belief that some areas of the Site may contain hazardous waste. Ex. B, Mr. Musgrave’s affidavit, is Petitioners’ richest source of factual evidence presented in this cause.
19. Permittee Liberty Mining sought to strike³⁷ portions of Mr. Musgrave’s affidavit, for lack of compliance with Tr. R. 56(E):

Form of affidavits – Further Testimony – Defenses required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies not previously self-authenticated of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. Denial of summary judgment may be challenged by a motion to correct errors after a final judgment or order is entered.

20. As Permittee Liberty Mine correctly asserts,

In order to be used in a summary judgment proceeding, an affidavit must be made on

³⁷ Permittee Liberty Mine’s December 12, 2016 Motion to Strike portions of Mr. Musgrave’s affidavit is supported in Permittee’s December 12, 2016 Reply Brief in Support of Respondent Liberty Mine, LLC’s Motion for Summary Judgment on Issue of Petitioners’ Standing.

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personal knowledge, must set forth such facts as would be admissible in evidence and must affirmatively show that the affiant is competent to testify as to the matters stated therein. Mere assertion of conclusions of law or opinions in an affidavit will not suffice. Ind. Trial Rule 56(E); *See Dedelow v. Rudd Equipment Corp.* (1984), Ind. App., 469 N.E.1206, 1209; *Indiana Univ. Hosp. v. Carter* (1983), Ind. App., 456 N.E.2d 1051, 1057. All portions of an affidavit which cannot be said to have been clearly based on personal knowledge must be stricken. *French v. Hickman Moving & Storage* (1980), Ind. App., 400 N.E.2d 1384, 1387.

Rubin v. Johnson, 550 N.E.2d 324 (Ind. App. 1990) (*accord*, *Rowe Brothers, Inc.*, *supra*).

21. Permittee Liberty Mine seeks to strike paragraph 2 of Mr. Musgrave's affidavit, which, in sum, notes that he and others have a unique understanding of the area and the issues at stake related to approving additional acreage to Liberty Mine. This statement is not supported by further evidence. Permittee Liberty Mine challenges this statement as an unfounded, self-serving conclusion which further does not satisfy Indiana Evidence Rule 701 ("Rule 701"), Opinion by Lay Witnesses:

If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

Paragraph 2 of Mr. Musgrave's affidavit provides some evidence as to Mr. Musgrave's motivation and state of mind (albeit minimal), as no further evidence is provided to support or describe the scope of his "unique understanding", and shall be maintained in the record.

22. Permittee Liberty Mine seeks to strike paragraph 5 of Mr. Musgrave's affidavit, which, in sum, states that Mr. Musgrave has knowledge and documentation from Alcoa that the operators dumped hazardous waste into portions of the Squaw Creek Mine in the 1960's and 1970's. Mr. Musgrave offers no further evidence in support of this statement. The source of Mr. Musgrave's knowledge is from other parties, and not himself, and is based on statements of third parties. Petitioners do not place the referenced documents into evidence, contrary to Indiana Evidence Rule 1002. The statement is being offered to prove the truth of its assertions, that the Site contains hazardous waste. The statement does not contain a clear relationship between the waste and the current Site. This statement is hearsay. Ind. Evidence Rules 801, 802. This statement will be admitted to the extent that it establishes Mr. Musgrave's unsubstantiated belief, but without further substantiation it will otherwise be stricken as inadmissible hearsay.

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23. Permittee Liberty Mine seeks to strike paragraph 6 of Mr. Musgrave's affidavit, which, in sum, states the waste's specific contents, and notes that "Alcoa's own documents" state specific volumes. Mr. Musgrave offers no further evidence in support of this statement. The source of Mr. Musgrave's knowledge is from other parties, not his own, and is based on statements of third parties. Petitioners do not place the referenced documents into evidence, contrary to Indiana Evidence Rule 1002. The statement is being offered to prove the truth of its assertions, that the Site contains specific hazardous waste components and volumes. The statement does not contain a clear relationship between the waste's location and the current Site. This statement is hearsay. Ind. Evidence Rules 801, 802. As this statement does not offer any probative value to the Court on the issues before it, it will be stricken as inadmissible hearsay.
24. Petitioner Liberty Mine seeks to strike paragraph 7 of Mr. Musgrave's affidavit, which, in sum, states that many former miners have stated that they acted, were told to act, or were aware of the dumping practices, and some miners so testified in sworn depositions or at the WQC application's public hearing. The source of Mr. Musgrave's knowledge is from what he believes others said or what he heard other parties say, not from his personal knowledge, and is based on statements of third parties. Petitioners do not place the referenced depositions or testimony into evidence, contrary to Indiana Evidence Rule 1002. The statement is being offered to prove the truth of its assertions, that the Site contains hazardous waste. The statement does not contain a clear relationship between the waste's location and the current Site. This statement is hearsay. Ind. Evidence Rules 801, 802. As this statement does not offer any probative value to the Court on the issues before it, it will be stricken as inadmissible hearsay.
25. Petitioner Liberty Mine seeks to strike paragraph 11 of Mr. Musgrave's affidavit, which, in sum, states that restrictive covenants apply to some of the dumping sites, repeats that former miners testified about the dumping practices in sworn depositions or at the WQC application's public hearing, that some of those areas that they identified are going to be re-mined per the WQC, and that surface water will run off through the covenanted areas and into Squaw Creek. The source of Mr. Musgrave's knowledge is from what he heard or believed other parties said, not from his personal knowledge, and is based on statements of third parties. Petitioners do not place the referenced documents into evidence, contrary to Indiana Evidence Rule 1002. The statement is being offered to prove the truth of its assertions, that the Site contains hazardous waste. The statement does not contain a clear relationship between the waste's location and the current Site. This statement is hearsay. Ind. Evidence Rules 801, 802. This statement will be admitted to the extent that it establishes Mr. Musgrave's unsubstantiated belief, but without substantiation this statement does not offer any probative value to the Court on the issues before it, it will be stricken as inadmissible hearsay.

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26. Petitioner Liberty Mine seeks to strike paragraph 17 of Mr. Musgrave's affidavit, which, in sum, states that Liberty Mine contains populations of two bird species on a Watch List. The source of Mr. Musgrave's knowledge is not established, is based on what he learned from a source not provided in the record, and is thus based on statements of third parties. Petitioners do not place the referenced Watch List documents into evidence, contrary to Indiana Evidence Rule 1002. The statement is being offered to prove the truth of its assertions about the bird populations, and infers that the Site and WQC will harm the referenced birds. This statement is hearsay. Ind. Evidence Rules 801, 802. This statement will be admitted to the extent that it establishes Mr. Musgrave's unsubstantiated belief, but without substantiation, this statement does not offer any probative value to the Court on the issues before it, it will be stricken as inadmissible hearsay.
27. Petitioner Liberty Mine further seeks to strike incidental references to hazardous waste and similar terms stated the paragraphs 9, 12, 15, 18 and 20 of Mr. Musgrave's affidavit. The terms are not substantiated by Mr. Musgrave, and lack substantiation. These terms will be given limited weight by the Court, and do not provide sufficient evidence that the referenced waste is, in fact, hazardous.
28. Petitioners contend that a March 20, 2008 Stipulation between Mr. Musgrave and the Indiana Department of Natural Resources suffices to establish a record supporting Mr. Musgrave's assertions as to hazardous waste placement at the former Squaw Creek Mine. *Petitioners' December 27, 2016 Reply Brief in Support of their Cross-Motion for Summary Judgment, p. 5.* Petitioners acknowledge that the "permit area referred to in the stipulation is not conterminous with the areas covered by" the disputed WQC in this case, *Id.*, but do not provide evidence as to how the Stipulated location does relate to the actual WQC Site. Petitioners then inform the Court that similar information can be found in public comment submitted to IDEM, in discovery responses (documents responsive to requests for production) to IDEM and Liberty in this case, and to documents referenced by Mr. Musgrave in his affidavit. *Id., p. 5, 6.* The documents are not included in Petitioners' responses contained in Liberty Mine's copy of Petitioners' responses. *Appendix to Respondent Liberty Mine, LLC's Motion for Summary Judgment on Issue of Petitioners' Standing, Tab B.* Petitioners neither provide nor designate this evidence in support of their cross motion for summary judgment.
29. Mr. Musgrave contends that the authorized mining activity will cause harm to his use and enjoyment, but the supporting record before this Court contains only his contentions supported by his subjective belief, and not by evidence supporting his opinion. Evidence presented by Mr. Musgrave does not suffice to show that IDEM's issuance of the WQC constitutes "a denial of some personal or property right or the imposition upon a party of a burden or obligation. . . The appellant must have a legal interest which will be enlarged or diminished by the result of the appeal." *Huffman* at 810. To the contrary, Mr. Musgrave presented no evidence that he was or will be required to enter the Site when Permittee Liberty Mine engages in activity permitted by the WQC. Mr. Musgrave claims no specific

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property interest, and states that he achieves his use and enjoyment from the Site via public locations – fishing from public roads, viewing wildlife from public areas. This court has rejected a party’s claim that they are aggrieved or adversely affected when they presented only “subjective speculations about consequences, which, if they did occur, were “stated in potential, speculative, remote terms” and relied upon “speculative, uncorroborated viewpoints.” *Auburn Nugget, LLC*, 2005 OEA 47, 52, *citing Blue Chip Casino*, 2004 OEA 109, 120, Therefore, on summary judgment, his allegations lack sufficient evidentiary support in the record for a determination that Mr. Musgrave has suffered or be likely to suffer in the immediate future harm so as to be individually aggrieved or adversely affected.

30. Mr. Musgrave asserts that his concerns are shared by others, including his friends, family, community, county and others. Having concerns shared with others does not transform Mr. Musgrave’s individual claims into the public complaints specifically rejected by *Huffman*. But, without sufficient proof that Mr. Musgrave’s supported claims are individual to him, he fails to raise a genuine issue of material fact that he is aggrieved or adversely affected.
31. As the conclusion that Mr. Musgrave is not aggrieved or adversely affected is dispositive, thus denying associational standing to Petitioners, the ELJ declines to address the remaining issues.
32. The Court has separately considered each party’s motion for summary judgment, to determine whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. Further, the Court has construed all facts and inferences and resolved issues of doubt in the fashion most favorable to each non-moving party. There being no genuine issue as to any material fact, summary judgment in Permittee Liberty Mine’s favor is appropriate.

FINAL ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that summary judgment is **GRANTED** to Permittee/Respondent Liberty Mine, LLC. The petitions for administrative review are **DISMISSED**. All further proceedings are **VACATED**.

You are further notified that pursuant to provisions of I.C. § 4-21.5-7-5, the Office of Environmental Adjudication serves as the ultimate authority in administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is a Final Order subject to Judicial Review consistent with applicable provisions of I.C. § 4-21.5, *et seq.* Pursuant to I.C. § 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.

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IT IS SO ORDERED this 18th day of April, 2017 in Indianapolis, IN.

Hon. Mary L. Davidsen
Chief Environmental Law Judge