

STATE OF INDIANA)
)
COUNTY OF MARION)

BEFORE THE INDIANA OFFICE OF
ENVIRONMENTAL ADJUDICATION

IN THE MATTER OF:)
)
OBJECTIONS TO THE ISSUANCE OF)
SECTION 401 WATER QUALITY)
CERTIFICATION NO. 2003-433-46-)
MTM-A ISSUED TO BLUE CHIP)
CASINO, LLC,)
MICHIGAN CITY, LAPORTE COUNTY,)
INDIANA.)

CAUSE NO. 04-W-J-3340

AND

IN THE MATTER OF:)
)
OBJECTIONS TO THE ISSUANCE)
OF NPDES PERMIT NO. IN 0062073)
ISSUED TO BLUE CHIP CASINO, LLC)
MICHIGAN CITY, LAPORTE COUNTY,)
INDIANA.)

CAUSE NO. 04-W-J-3342

_____)
)
BLUE CHIP CASINO, LLC)
Permittee,)
)
ROBERT & MICHELLE NAUYOKAS,)
Petitioners.)
)
INDIANA DEPARTMENT OF)
ENVIRONMENTAL MANAGEMENT,)
Respondent.)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND
FINAL ORDER GRANTING BLUE CHIP CASINO, LLC's MOTION FOR
INVOLUNTARY DISMISSAL OF PETITIONER ROBERT AND MICHELLE
NAUYOKA'S PETITIONS FOR ADMINISTRATIVE REVIEW AND
PETITIONS FOR STAY OF EFFECTIVENESS

This matter came before the Court on Petitioners, Robert and Michele Nauyokas, May 10 and 11, 2004 Petitions for Administrative Review and Petitions for Stay of

Effectiveness, and on Permittee Blue Chip Casino, LLC's August 3, 2004 Motion for Judgment on the Evidence, or in the Alternative Motion for Involuntary Dismissal on the Issue of Standing.

And the Chief Environmental Law Judge ("ELJ"), having read and considered the petitions, motions, record of proceeding, evidence, and briefs and responses of the parties, now finds that the Petition for Administrative Review and Petition for Stay of Effectiveness is dismissed involuntarily, per Ind. Trial Rule 41(B) and Ind. Code § 4-21.5-3-7 for lack of standing to seek administrative review of the permits in issue. Judgment may be made upon the record. The ELJ, by a preponderance of the evidence, now makes the following findings of fact and conclusions of law, and enters the following Order with respect to the Petition of Robert and Michele Nauyokas.

Please be notified that the Office of Environmental Adjudication ("OEA" or "Court") hereby **GRANTS** the Permittee's Motion for Involuntary Dismissal of Cause Nos. 04-W-J-3340 and 04-W-J-3342 under Trial Rule 41(B), and Ind. Code § 4-21.5-3, et seq., finding that Petitioners Robert and Michele Nauyokas lack requisite standing to proceed with their Petition for Administrative Review and Petition for Stay of Effectiveness. The Environmental Law Judge hereby makes the following findings of fact and conclusions of law:

Findings of Fact

1. Petitioners Robert and Michele Nauyokas ("Nauyokas") timely objected to the Indiana Department of Environmental Management's ("IDEM") issuance to Permittee Blue Chip Casino the following permits: Section 401 Water Quality Certification No. 2003-433-46-MTM-A, issued April 21, 2004, objection and stay request

filed May 10, 2004 (OEA Cause No. 04-W-J-3340) (hereinafter “401 Certification”); and NPDES Permit No. IN 0062073, issued May 11, 2004, objection and stay request filed May 11, 2004 (OEA Cause No. 04-W-J-3342) (hereinafter “NPDES Permit”). In their Petitions for Administrative Review and Petition for Stay of Effectiveness, Petitioners alleged:

Robert and Michele Nauyokas have engaged frequently in sports fishing in Trail Creek and have eaten fish taken from the river. They have had many family outings in Michigan City involving boating on and fishing of the river. As a result, they are concerned for the quality of the waters of Trail Creek and the condition of fish inhabiting the river and their enjoyment Of their recreational activity in and around Trail Creek would be substantially diminished by the prospective degradation of the quality of Trail Creek’s waters and/or fishery. Mr. and Mrs. Nauyokas also own a retail business in New Buffalo, Michigan, known as The Cool Pepper, which specializes in the sale of gourmet foods. Boaters and sports fisherman from the Michigan City area are among the customers of the Nauyokas’ business. Consequently, discharges authorized by the Permit which may adversely affect the fisheries and environs of Trail Creek would be detrimental to the Nauyokas’ business.

2. In summary, these Permits authorize Permittee, for less than one year, to dredge material from the bed of Blue Chip Basin, and to allow the dredged material to dewater on-site. Blue Chip Basin discharges into Trail Creek, a body of water which discharges into Lake Michigan, in Michigan City, La Porte County, Indiana. The purpose of the permitted activity is to provide the Permittee with adequate space to construct and dock a larger casino watercraft.

3. On June 30, 2004, Petitioners filed an “Emergency Motion for Temporary Stay Pending Hearing on Motion to Stay,” with respect to both the 401 Certification and the NPDES Permit. Following briefing, the undersigned denied the motion by written entry dated July 8, 2004.

4. The hearing on the Petitions for Stay commenced on July 20 and 21,

2004; at the conclusion of partial presentation of evidence, Petitioners verbally renewed and were granted their Motion for Temporary Emergency Stay until August 13, 2004. The hearing recommenced and concluded on August 3, 2004. At the conclusion of the evidence, counsel for Permittee orally moved to vacate the emergency stay. On August 4, 2004, the Court entered an Order Lifting Temporary Emergency Stay, Findings of Fact and Conclusions of Law, which Order is incorporated herein by reference. By agreement of the parties, the undersigned directed that Permittee and Petitioners submit proposed findings of fact and conclusions of law on the issue of stay on a nonemergency basis, which were filed on August 13, 2004.

5. On August 3, 2004, Permittee filed a Motion for Judgment on the Evidence, or in the Alternative, Motion for Involuntary Dismissal on the Issue of Standing, with accompanying Memorandum of Law (“Motion to Dismiss”). At the close of testimony on the issue of Stay and Emergency Stay on August 3, 2004, the parties and Court conferred about the briefing schedule set previously in this matter and about responsive/reply briefing to Blue Chip’s August 3, 2004 Motion. The Court verbally ordered that it would not rule upon the issue of standing until the parties had completed their responsive/reply briefing. Therefore, the Court’s August 4, 2004 Order intentionally did not address the issue of standing as raised in Blue Chip’s August 3, 2004 Motion. On August 13, 2004, Petitioners filed their Response to Permittee’s Motion for Judgment on the Evidence, or in the Alternative, Motion for Involuntary Dismissal on the Issue of Standing.

6. Petitioners Robert and Michele Nauyokas, husband and wife (the

“Nauyokas”) reside in Michigan City, Indiana, and own and operate a business, Cool Pepper, in New Buffalo, Michigan. (On July 13, 2004, Petitioners, J. Michael Milligan and Susan L. Milligan, by counsel, voluntarily submitted a Notice of Withdrawal of Petition for Administrative Review and Petition for Stay of Effectiveness; this Court issued a Final Order of Dismissal of the Milligans on July 14, 2004).

7. The Permittee is Blue Chip Casino, LLC (“Blue Chip”). Blue Chip currently operates a riverboat casino in Michigan City, Indiana. The riverboat casino and permitted activity are located on Blue Chip Basin. Dredging to create Blue Chip Basin and related riverboat casino construction were originally authorized per permits issued in approximately 1996 by IDEM and other relevant agencies.

8. In summary, these Permits authorize Permittee to dredge material from the bed of Blue Chip Basin, and to allow the dredged material to dewater on-site. Blue Chip Basin discharges into Trail Creek, a body of water which discharges into Lake Michigan, in Michigan City, La Porte County, Indiana. Trail Creek and Blue Chip Basin are part of the drainage basin of Lake Michigan, one of the Great Lakes. 327 IAC 2-1.5-5(a)(3)(A). The purpose of the permitted activity is to provide the Permittee with adequate space to construct and dock a larger casino watercraft. Blue Chip proposes to construct an expansion of its gaming facility in Michigan City, Indiana, which will entail modifications, among other things, to Blue Chip Basin to accommodate the construction and operation of a larger gaming vessel (the “Project”). (Tr. p. 54.) The Project will include, among other activities, the construction of a cofferdam system in the northern portion of Blue Chip Basin to enclose an approximately 2.4-acre area which includes the original graving dock (dry dock) constructed by Blue Chip in 1996-97 for construction of

the existing gaming vessel. The purpose of the cofferdam is to allow the evacuation of basin water from the area so that an expanded graving dock can be created to enable construction of the proposed new gaming vessel. (Tr. p. 54-56). Once confined basin water is pumped from the cofferdam-enclosed area, a well-point system is proposed to be employed to remove groundwater from within the cofferdam-enclosed area and to prevent groundwater outside the cofferdam from undermining the structural integrity of the cofferdam. (Tr. p. 57-58). Blue Chip proposes to discharge the groundwater withdrawn by the well-point system, along with other waters, to the southern part of Blue Chip basin and then to Trail Creek. (Tr. p. 57-58 and 190). The groundwater to be withdrawn by use of the well-point system is referred to as the “dewatering” wastewater. (NPDES Permit, Stipulated Exhibit 2, page 3 of 22.) The undisputed evidence established that Blue Chip will remove approximately 5.2 pounds of mercury from Trail Creek sediments through dredging, while adding approximately .00095 pounds of mercury to Trail Creek through groundwater pumping and eventual discharge (Tr. p. 375). This Court concluded, in its August 4, 2004, Order Lifting Temporary Emergency Stay, Findings of Fact and Conclusions of Law, August that:

the well point system constitutes the “same body of water” as Trail Creek pursuant to 327 IAC 5-2-11.5(b)(4)(B)(iii) for two reasons. While the mercury in the groundwater is reasonably expected to reach the vicinity of the discharge point to Trail Creek in a reasonable period in the absence of the dewatering system, accelerated delivery is permitted under Indiana law. And, the preponderance of evidence indicates that the mercury present in groundwater at GW-5 is not likely to have arisen partially or entirely to human activity, despite the solitary and substantially elevated nature of mercury concentration at this location.

The Court further concluded that the level of discharge indicates that the projected effluent quality is not likely to exceed the applicable wildlife water quality criterion for mercury of 1.3 ng/l.

9. The Indiana Department of Environmental Management (“IDEM”),

through the Office of Water Quality, is the party that issued the NPDES Permit and the 401 Certification to Blue Chip relating to the expansion activities.

10. The Nauyokas allege that the irreparable harm they will suffer is increased mercury in Trail Creek which in turn, allegedly, will prevent them and other members of the public from recreating in and around Trail Creek and, allegedly, will harm their gourmet food store revenue located in New Buffalo, Michigan.. The Nauyokas' reside at 3609 Dorchester Road in Michigan City, Indiana, which is located approximately about two (2) miles from Trail Creek. (Transcript of Stay Hearing commencing on July 20, 2004 ("Transcript"), p. 21). Petitioners do not own any property closer to Trail Creek than their residence (Tr. p. 33).

11. The Nauyokas testified that they own a business called the "Cool Pepper" in New Buffalo, Michigan, which is a gourmet retail spice store. (Tr. p. 25). The sole owners of the incorporated business (Cool Pepper, Inc.) are Michele and Robert Nauyokas. (Tr. 25, 44). The business is approximately two blocks from the Lake Michigan waterways in the New Buffalo area. (Tr. p. 26). The Nauyokas further testified that the business was started in August, 2003. (Tr. p. 25, 34).

12. Michele Nauyokas is employed with the Michigan City Area Schools, working for the school system as a teacher since 1971. (Tr. p. 22-23).

13. The Nauyokas became involved in this matter when their business landlord approached them about the dredging, excavation and discharges of water from the Blue Chip Casino area into Trail Creek. (Tr. p. 24). Michele first learned of this matter in approximately May of 2004. (Tr. p. 31).

14. Michele testified that she became involved in this matter because she

has lived in Michigan City all of her life and enjoys Lake Michigan. She further testified that her family has boated and fished in the area; she does not agree with the dredging if it impacts the water quality environment and she believes that it does. (Tr. p. 24).

15. Robert Nauyokas testified that he has also lived in the Michigan City area all of his life. (Tr. p. 42). Mr. Nauyokas testified that he became involved in this matter because he is concerned about the environment and he does not want the fish that he eats to be contaminated. (Tr. p. 43).

16. The Nauyokas testified that they are concerned about the impact that the construction activities at the Blue Chip facility will have on their business and customers. (Tr. p. 25-26).

17. Mrs. Nauyokas stated that, while she had never personally done any fishing in Trail Creek, other members of her family have. Her father once owned a boat and she and her husband would like to own one someday (Tr. p. 28). Michele testified that her family members continue to fish and the Nauyokas intend to return to water activities in the future. (Tr. p. 28, 47). Michele continues to use the beaches for sunbathing activities in the Trail Creek or Lake Michigan area. Id.

18. The Nauyokas testified both work in their business, with the business being Robert Nauyokas' employment, and Mrs. Nauyokas working at the business in supplement to her teaching career. The projected annual revenue for the business is approximately \$110,000. (Tr. p. 37). The Nauyokas describe New Buffalo as a tourist City with the seasonal time to be May through September. The customer base for the Cool Pepper is approximately 40% from boaters, 40% from second homeowners and 20% from the surrounding area. (Tr. p. 26, 44). The Nauyokas provided no further

specific financial data for the store except to assert that their sales for the store has been very good. Id.

19. The Nauyokas testified that the Cool Pepper also attracts customers from the Michigan City area and advertises extensively in that area through a local radio station and local newspaper in Michigan City. (Tr. p. 26-27). The Nauyokas stated that the Cool Pepper attracts customers from Trail Creek and the Michigan City area. Id.

20. The Nauyokas stated their opinion that their business will be adversely affected if Blue Chip is allowed to discharge contaminated waters into the Trail Creek area. (Tr. p. 27, 44). Ms. Nauyokas testified:

Q And do you believe that your business will be adversely affected if Blue Chip is allowed to discharge contaminated waters into Trail Creek or the Trail Creek area?

A Yes. I think it's going to have a lot of impact on our business. We have boaters that like to fish, that go out fishing, that use Trail Creek, use Lake Michigan to travel, and they are not going to want to do that.

Q And do you believe that your business would be adversely affected if Blue Chip is allowed to discharge waters containing mercury into the Trail Creek area?

A Yes. That's a very dangerous thing. From what I understand about this, the mercury can be eaten by the fish. That mercury attaches itself to the fatty cells and grows and when we catch the fish and eat it, we're in trouble.

(Tr. p. 27).

Ms. Nayoukas further testified that the Cool Pepper's business would be impacted by the dredging project at Blue Chip because of the close proximity between New Buffalo and Michigan City. According to Ms. Nauyokas, New Buffalo is located on Lake Michigan approximately 10-12 miles distant from Michigan City (Tr. p. 30). She further stated that many boaters have slips in Trail Creek and those slips are being lost. Also, the boaters travel and fish as they go and dock in New Buffalo where they eat and shop. (Tr. p. 38).

Ms. Nauyokas stated her opinion that the discharge of mercury into Trail Creek will have an impact on the fishing, water fowl and water life that exists and that will do harm to the Nauyokas' business. (Tr. p. 38-39).

21. The Nauyokas testified that they also made recreational use of the Trail Creek area, supported by the following testimony: Ms Nauyokas stated that her entire family loves to fish and they have fished all of their lives along Trail Creek. The family also enjoyed a boat owned by Michele's father for fishing, skiing and things like that in Lake Michigan. (Tr. p. 28). Although the Nauyokas' water activities in the Trail Creek area have diminished in the last several years due to the age of their children and work commitments, Mr. Nauyokas stated that he has always engaged in "a lot of fishing in Trail Creek." As he was growing up, he fished, along with Michele's brothers and nephew, in the Trail Creek area and Lake Michigan. The boat was docked at the Sprague Marina. (Tr. p. 45). Although Mr. Nauyokas stated that he is currently not engaged in fishing activities, he intends to return to the sport in the future. (Tr. p. 47).

20. Ms. Nauyokas expressed concern that dredging in connection with the project will worsen the mercury problem in Trail Creek and possibly make fishing in the creek and in Lake Michigan less attractive "if it impacts the water quality environment and I believe that it is" (Tr. p. 24). Ms Nauyokas stated that she is concerned that mercury problems in Trail Creek might cause boaters and fishing enthusiasts to stop coming to New Buffalo, either because boat slips would be lost due to the project, or because "If the Trail Creek is on – inaccessible for periods of time, with a project that's going on, contaminated with mercury, it's going to impact the fishermen and they're not going to want to come and fish in our area and they're going to move to another area

where it's safer" (Tr. pp. 38-39). Ms. Nauyokas offered no specific testimony as to the number of boat slips to be lost, nor did she claim loss of a any slip to which Petitioners sought access.

21. Ms. Nauyokas had no further explanation as to why water quality problems in Trail Creek would deter boaters from fishing in a water body fifteen miles distant.

22. Ms. Nauyokas further did not explain how any water quality problems in New Buffalo could be traced to the proposed or actual discharge from the Blue Chip project (Tr. p. 39-40). Ms. Nauyokas did express concerns that water quality problems might spread from Michigan City to New Buffalo, but did not explain how or why that would be the case (Tr. p. 27).

23. Ms. Nauyokas also testified that Blue Chip's construction in the creek might block boat access to Lake Michigan. When asked to explain this concern, she stated that boats might be trapped in the Blue Chip inlet (Tr. p. 40). However, a recent aerial photograph of the area used by both sides (Exhibit 19) shows only one boat docked in the inlet, that being the Blue Chip casino vessel.

24. Ms. Nauyokas further testified that she used to frequent Lake Michigan beaches but has only gone two or three times since the Cool Pepper store opened and has occupied her time. She expressed a concern that she might not go to the beach if water quality worsened because "I don't think that it would be safe even to be using the water" (Tr. p. 29).

25. Ms. Nauyokas said that she would not purchase fish, which she

identified as perch and salmon, taken from Lake Michigan or Trail Creek if the mercury problem got worse, and in that event she would stop going to the beach (Tr. p. 29).

26. Mr. Nauyokas testified that neither he nor his family had done any fishing, on Trail Creek or anywhere else, for the past three years (Tr. p. 47). When he did fish, he went to Lake Michigan, as it was a more attractive location for him than Trail Creek where he was “a little leery” about fishing (Tr. p. 49). The only time the Nauyokas’ consumed a locally-caught fish in the past three years was four days prior to their testimony, when Mr. Nauyokas was given a salmon by a friend (Tr. p. 48). Mr. Nauyokas didn’t know whether the salmon was taken from Lake Michigan or Trail Creek (Tr. p. 48).

27. To Mr. Nauyokas’ knowledge, neither he nor his wife has ever eaten a fish taken from Trail Creek (Tr. p. 49). Part of the reason for his not eating Trail Creek fish is his awareness of a fish advisory currently in effect for Trail Creek, which advisory was issued prior to and without regard for Permittee’s activity in Trail Creek.

28. During the multiple days of testimony, in addition to the facts testified to by the Nauyokas’, as stated above, the parties presented expert testimony concerning methods for calculating mercury levels from the test wellfields. In addition, Permittee presented witness testimonies as to the permitted project’s impact on the Permittee and the local community. None of the witnesses stated any further level of harm or negative impact on Petitioners.

Conclusions of Law

1. The Office of Environmental Adjudication (“OEA”) has jurisdiction over the

decisions of the Commissioner of the Indiana Department of Environmental Management (“IDEM”) and the parties to this controversy pursuant to Ind. Code § 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. IDEM’s issuance of the permits contested in these matters, Section 401 Water Quality Certification No. 2003-433-46-MTM-A, and NPDES Permit No. IN 0062073, are decisions of the IDEM Commissioner eligible for review by OEA.

4. OEA is authorized to apply the Indiana Rules of Trial Procedure when the procedure to be applied does not conflict with Ind. Code § 4-21.5, et seq., or with 315 IAC, et seq. 315 IAC 1-3-1(10), *cited in Huffman v. Indiana Office of Environmental Adjudication*, 811 N.E.2d 806, 813 (Ind., June 30, 2004)(appeal of OEA review of NPDES permit).

5. Permittee’s August 3, 2004 Motion for Involuntary Dismissal on the basis of standing raised a threshold issue to the OEA’s jurisdiction over Petitioners’ case. Evidence of Petitioners’ standing was presented in their Petitions, pleadings, evidentiary testimony at the hearing settings, and in Petitioners’ Response to Permittee’s Motion for Involuntary Dismissal. As the issue of Petitioners’ standing is being resolved at the close of evidence, it is a Motion for Judgment on the Evidence to be treated as a Motion for Involuntary Dismissal under Trial Rule 41(B). *Michael v. Wolfe*, 737 N.E.2d 820, 822 (Ind. App. 2002), and the court may weigh evidence, judge witness credibility, and determine whether the party seeking a right to relief has met its burden of proof. *Wolfe*, *citing Plesha v. Edmonds ex rel. Edmonds*, 717 N.E.2d 981, 985 (Ind. App. 1999).

6. Ind. Code § 4-21.5-3-7(a)(1) (1998) provides that to qualify for administrative

review of an agency order, a person must:

(1) State facts demonstrating that:

(A) the petition 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.

Huffman, Id. at 810. While *Huffman* distinguishes this standard from “standing”, the statute illuminates a similar legal concept, therefore any references to standing in Indiana proceedings before OEA reference the statutory standard.

7. “AOPA [Ind. Code § 4-21.5, et seq.] defines who can get administrative review. When a statute is clear, we do not impose other constructions upon it. *Ind. Bell tel. Co. v. Ind. Util. Regulatory Comm’n*, 715 N.E.2d 351, 354 (Ind.1999) “(other cites omitted) *Huffman*, Id. at 812. “We hold that the statute, and only the statute, defines the class of persons who can seek administrative review of agency action.” Id. at 813.

8. Petitioners are not the persons to whom the order is specifically directed, nor has there has been no demonstration or allegation that Petitioners seek review under Ind. Code § 4-21.5-3-7((a)(1)(C) (*Huffman* specifically prohibited review of “public harm”, versus personalized harm, Id. at 812, therefore OEA cannot analyze Petitioners’ pled harms as providing them with a right to review under a public harm theory). 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 order issuing Section 401 Water Quality Certification No. 2003-433-46-MTM-A and NPDES Permit No. IN 0062073.

9. The Court in *Huffman* defined “aggrieved or adversely affected” as “[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 pecuniary, property or legal interest.” Id. at 810. “[T]he concept of “aggrieved” is more than a feeling of concern or disagreement with a policy; rather, it is a personalized harm.” Id. at 812.

10. In *Huffman*, the Supreme Court whether a private citizen/corporation owner was entitled to seek review of an NPDES permit for a source downstream from the corporation's property. 810 N.E.2d 806. Ms. Huffman supported her aggrieved or adversely affected status by asserting that while she did not reside on the corporate property, she had managed it and entered it since 1987. Id. at 815. Ms. Huffman asserted that “IDEM failed to address health risks to the residential use of contiguous property from toxicology research and other . . . activities involving discharge of water.” As the *Huffman* court held that OEA “never gave the parties an opportunity to provide additional evidence or to develop the arguments more fully, such as through a hearing”, Id. at 814, OEA's decision on Ms. Huffman's aggrieved or adversely affected status was not supported by substantial evidence, the case was remanded to OEA for further proceedings as related to Ms. Huffman's health problems. Id. at 816.

11. *Huffman* further held that OEA correctly held Ms. Huffman could not seek review of alleged harm to the interest of the corporation in which she held an ownership/management interest, as that corporate entity was not a party to the administrative adjudication, and that Ms. Huffman's individual interest might have

different goals and interests which could be harmed, even inadvertently, by the shareholder's representation of that interest. *Id.* at 814.

12. In this case, Petitioners sought review for their individual interests, and for their individual interests in Cool Pepper, Inc. to this review as a party. To the extent that their Petitions referenced Cool Pepper, Inc.' interest, it was stated in the context of the loss of income to the Petitioners individually. This Court is therefore limited to analyzing the effect of the permitted activity on the Nauyokas' personal pecuniary interest.

13. Immediately prior to and after Permittee filed its Motion for Involuntary Dismissal on the Issue of Standing ("Motion"), Petitioners presented sworn testimony at a multi-day evidentiary hearing on their Petitions for Stay of Effectiveness of the permits. The legal burden on Petitioners at the Stay Hearing required them to prove irreparable harm. After Permittee had filed its Motion, Petitioners personally elected not to attend the last day of testimony, and submitted further response to the Motion in an August 13, 2004 Responsive Pleading. In this case, contrary to the procedural events in *Huffman*, Petitioners had the opportunity to provide additional evidence or to develop the arguments more fully, such as through a hearing.

14. The economic harm alleged by the Nauyokas, along with the intangible harm of the loss of their livelihoods, good will of their business, and their personal use and enjoyment of the Trail Creek and Lake Michigan waterways for recreational purposes was stated in potential, speculative, remote terms. Petitioners stated that they did not live nor own property contiguous to Trail Creek, and that The Cool Pepper was over ten miles distant. Petitioners testified to occasional, elective contact with Trail Creek waters. While their Petitions stated that they had engaged in sports fishing and boating and

family outings on Trail Creek, their testimony stated that they had done so sporadically and at least three years in the past; that they had a desire to do so at some future time, but had no specific plans beyond a future desire. Their Petitions stated that they had eaten fish taken from Trail Creek; in contrast, they testified that they were aware of a fish advisory prohibiting such consumption, and stated that they had been given a fish which may or may not have come from Trail Creek. Ms. Nauyokas further testified that the permitted activity might deter her from going to the beach, but did not state specific instances of future intent, instead indicated that her water recreation time had been consumed by her working at The Cool Pepper. The Nauyokas' did not present evidence of health concerns personal to them, nor was the testimony provided by Petitioners' expert witness that he could not specify harm to the Nauyokas' health caused by the permitted activity. The pecuniary harm to Petitioners from loss of income at The Cool Pepper could not be specified by Petitioners: they testified that their last year's gross revenue was approximately \$110,000 but were unable to specify the amount of net profit, that working at The Cool Pepper was Mr. Nauyokas' primary occupation, that Mrs. Nauyokas worked at The Cool Pepper when her employment as a school teacher allowed, and that The Cool Pepper's business was seasonal, concentrated between May and September, a time prior to the commencement of significant but temporary permitted activity. Petitioners' testimony relied in significant part on their subjective, uncorroborated viewpoints, a subjective viewpoint rejected in *Gordon v. Guide Corp.*, 2001 WL 1168144m 4 (S.D.Ind. 2001) The Petitioners' evidence presented subjective speculations about consequences, which if they did occur, were remote to Petitioners, and which did not refute testimony that mercury levels in Trail Creek would ultimately be

reduced. The Petitioners have not provided substantial evidence that the Nauyokas' are "aggrieved or adversely affected", nor that they must have suffered or be likely to suffer in the immediate future harm to a legal interest, be it pecuniary, property or legal interest.

15. This Court rejects Permittee's invitation to deem any other entity, such as the Potawatomi Band of Indians, as qualifying for administrative review, as aggrieved or adversely affected. While some evidence indicates that Petitioners' counsel and some expert witnesses may have been in contact with tribe representatives, such analysis is not probative of Petitioners' right to administrative review.

16. This Court concludes that *Huffman* provides legal precedent applicable to these Petitions; a similar standard was applied by this Court in *In re: Objection to the Issuance of the Modification to Permit FP # 82-02 Laubscher Meadows Landfill, Vanderburgh County, Indiana*, Cause No. 96-S-J-1677 (Sept. 26, 1998)(allegations that organization had members in immediate vicinity of facility who believe that the approval and implementation of the permit may cause serious injury to their health, environment and value of property insufficient to support aggrieved and adversely affected claim). Even if this Court were to adopt the rationale used by the New Jersey District Court in 1991, Petitioners did not present substantial evidence to demonstrate that they suffered, or were likely to suffer, injuries through waters directly affected by discharges, and did not establish evidence of illegal discharges, as found sufficient in *Public Interest Research Group of New Jersey, Inc. v. GAF Corporation*, 770 F.Supp. 943, 952 (D.N.J. 1991). Petitioners did not present substantial evidence to demonstrate that they or The Cool Pepper were harmed by continuous and illegal pollutant discharges, had more than a remote and speculative recreational interest in the affected waters, nor that a "standing"

analysis rejected in *Huffman* should be applied as was analyzed in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 184-185 (2000), in *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149 (4th Cir. 2000), in *Sierra Club v. Simkins Industries, Inc.*, 617 F.Supp. 1120 (D. Md. 1985), or in *Matter of Recovery I, Inc.*, 635 So.2d 690 (La.Ct.App. 1994).

17. For lack of substantive evidence probative that Petitioners are aggrieved or adversely affected by IDEM's issuance of Section 401 Water Quality Certification No. 2003-433-46-MTM-A, and NPDES Permit No. IN 0062073, Petitioners' Petitions for Administrative Review and Petitions for Stay of Effectiveness should be dismissed.

Final Order

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Permittee Blue Chip Casino, LLC's ("Blue Chip") August 3, 2004 Motion for Involuntary Dismissal on the Issue of Standing is **GRANTED**, the May 11, 2004 Petitions for Administrative Review and Petition for Stay of Effectiveness filed by Petitioners Robert and Michele Nauyokas are **DISMISSED** for lack of standing.

You are hereby further notified that pursuant to provisions of Indiana 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 IC 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 12th day of November, 2004.

Hon. Mary L. Davidsen
Chief Environmental Law Judge

DISTRIBUTION, via U.S. Mail, and via email as a courtesy:

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