

**OBJECTION TO THE APPROVAL OF COAL COMBUSTION
RULE DEADLINE VARIANCE NIPSCO R.M. SCHAHFER GENERATING
STATION SOLID WASTE PROGRAM ID 37-01
WHEATFIELD, JASPER COUNTY, INDIANA
2020 OEA 101**

Official Short Cite Name:	NIPSCO R.M. Schahfer Generating Station, 2020 OEA 101
OEA Cause No.:	19-S-J-5046
Topics/Keywords:	Summary Judgment Non-coal combustion residual (CCR) waste Variance 40 CFR 257.101(a)(1) and (b)(1)(i) / 329 IAC 10-9-1(b) IC 4-21.5-3-7(a)(2) and (3) Standing CCR Rule
Presiding ELJ:	Mary Davidsen, Esq.
Party Representatives:	Eric J. Beaver, Esq. Daniel J. Deeb, Esq. Steven D. Thill, Esq
Order Issued:	February 13, 2020
Index Category:	Land Quality
Further Case Activity:	

FINDINGS OF FACT

1. Permittee/Respondent¹ Northern Indiana Public Service Company LLC (“NIPSCO”) generates electricity through coal combustion at its R.M. Schahfer Generating Station, Wheatfield, Jasper County, Indiana (“Site”). On January 11, 2019, the Indiana Department of Environmental Management (“IDEM”) issued a Variance Request (“Variance”), approving NIPSCO’s December 3, 2018 Variance Request to extend the time when NIPSCO had to stop placing non-Coal Combustion Residual (“CCR”) waste into its three smallest surface water impoundments, extending the deadline from October 31, 2020 to July 23, 2023.
2. NIPSCO’s four on-Site CCR impoundments are identified as its Waste Runoff Area (“WRA”), Material Storage Runoff Basin (“MSRB”), Metal Cleaning Waste Basin (“WCWB”), and the Waste Disposal Area (“WDA”) (collectively, “Impoundments”). The Impoundments have been in service for over 40 years.² As for regulatory area, three are under 40 acres; the WDA is over 40 acres. Two waste streams feed in to the Impoundments: CCR waste and non-CCR waste. Non-CCR wastes include flue gas desulfurization (“FGD”) product runoff, coal pile runoff, FGD process area storm water, boiler blowdown, and non-chemical metal cleaning waste.³ The Variance applies only to non-CCR waste in the three Impoundments which are under 40 acres: the WRA, the MSRB and the WCWB.
3. To summarize the events leading up to NIPSCO’s Variance Request: On-Site adverse groundwater impacts from the Impoundments triggered federal corrective measures specified in 40 C.F.R. Pt. 257 Subpt. D (“CCR Rule”). Adverse groundwater impacts were detected only within the Schahfer Site.⁴ NIPSCO is currently implementing corrective measures at the Impoundments. Neither the adverse groundwater impacts, nor the federal corrective measures, nor CCR waste, are the subject of the Variance, and are therefore not before OEA in this case.

¹ NIPSCO characterizes its participation in this case as an intervenor, which is a possible application of Ind. Code § 4-21.5.-3-7(a)(1)(a), “a person to whom the order is specifically directed”. Based on burden of proof considerations, OEA characterizes an entity in NIPSCO’s litigation stance as a Respondent, and will so refer to NIPSCO in this case.

² *NIPSCO’s Aug. 15, 2019 Memorandum of Law in Support of [its] Motion for Summary Judgment* (“NIPSCO Memo.”), Ex. J, Golder Assocs., Inc., Hazard Potential Classification Assessment and Visual Inspection Report, p. 8 (Sept. 28, 2016). For the reader’s convenience, the Court is citing to the NIPSCO Memo exhibits for some documents, as it is the document containing most of the relevant exhibits.

³ *NIPSCO Memo*, Ex. B (Dec. 20, 2018 Ltr. From M. Turman, NIPSCO, to B. Pigott, IDEM, p. 2).

⁴ *NIPSCO Memo*, Ex. C (Jan. 11, 2019 Ltr. From B. Pigott, IDEM to M. Turman, NIPSCO, p. 3).

4. Further, the Impoundments did not meet all five location restrictions applicable under the federal CCR Rule. For corrective action, NIPSCO elected to implement alternative closure, as provided in the CCR Rule.⁵ Per the closure provisions, closure for the three under-40 acre impoundments must be completed by October 17, 2023, and for the one over-40 acre impoundment by October 17, 2028, if the owner or operator certifies within six months of becoming subject to closure requirements that the boilers will cease operating by those dates. On February 15, 2019, NIPSCO submitted its certifications regarding its intent and to comply with alternative closure requirements and to cease operating the boilers by October 17, 2023.
5. Later, the U.S. EPA issued its interpretation of the CCR Rule to prohibit the placement of non-CCR wastes in CCR impoundments such as NIPSCO's after October 31, 2020. NIPSCO's December 3, 2019 Variance Request sought to continue placement of non-CCR wastes in the Impoundments until July 30, 2023, instead of October 31, 2020.
6. The Variance states that it presents a "low risk" to human health and the environment.⁶ Despite the Variance, "NIPSCO remains subject to the closure and corrective action provisions of the CCR rule."⁷
7. On January 28, 2019, Petitioners Board of Commissioners of Jasper County, Indiana ("Commissioners") and Jasper County Health Department ("Health Dep't") filed a Petition for Administrative Review⁸, challenging the Variance IDEM issued to NIPSCO, by their county attorney, who has represented them during this case.
8. On May 3, 2019, Permittee/Respondent NIPSCO filed a letter "to advise pursuant to 315 1-3-6(b) that NIPSCO's affirmative defenses in the matter include our contention that the filed Petition for Administrative Review . . . is inadequate and Petitioners lack standing as persons aggrieved.", and asserting "the petition's inadequacies include noncompliance with 315 IC 1-3-2(b)(2), with respect to the Board of Commissioners, and 315 IAC 1-3-2(c)(2).
9. So that the parties could explore settlement, the initial prehearing conference before OEA was continued, then conducted telephonically as requested on May 6, 2019⁹.

⁵ 40 C.F.R. § 357.103(b). *See* 329 IAC 10-9-1(b), (c).

⁶ *NIPSCO Memo*, Ex. C, Variance, p. 4.

⁷ *IDEM Reply Brief*, p. 3.

⁸ The Jasper County Drainage Board was not listed as a Petitioner on the January 28, 2019 Petition.

⁹ As is the case of most OEA prehearing conferences, this prehearing conference was not conducted on the record. Instead, the Court's resulting Report creates a Record of the prehearing conference, which Report is subject to a

The Court's May 6, 2019 Order¹⁰ noted:

The parties discussed general proceedings before OEA, and Respondent/Permittee NIPSCO's May 3, 2019 affirmative defenses, which raised the issues as to whether Petitioners' Petition for Administrative Review complied with required portions of 315 IAC 1, *et seq.*, and whether Petitioners were aggrieved and adversely affected as required in Ind. Code § 4-21.5-3-7. The Court noted that these threshold issues may void preceding litigation efforts if not addressed early in the proceedings. The Court noted that parties might elect to raise such issues, particularly those of aggrieved or adversely affected status, by motion to dismiss, by bifurcated hearing, or by other means which lead to a decision before litigation of other issues moves forward. The Court further noted that discovery before OEA was governed by Indiana's Trial Rules, and could commence at any time.

The parties agreed to confer and to submit a proposed case management order (preferably joint) by May 21, 2019.

10. The parties' May 20, 2019 joint proposed case management order was adopted in the Court's May 29, 2019 Case Management Order, which included two separate calendars: one "concerning jurisdiction, the second concerning contested substantive issues". No schedule was requested or issued for filing an Amended Petition. No further scheduling orders were sought or issued.
11. On June 5, 2019, the Commissioners and Health Dep't. filed an Amended Petition. The Amended Petition included Jasper County Drainage Board ("Drainage Board") as a petitioner. Per the Amended Petition¹¹,
 - the Commissioners are Kendell Culp, President, James A. Walstra, Vice President, and Richard E. Maxwell, Member.
 - the Drainage Board members are Richard E. Maxwell, President, and members James A. Walstra and Kendell Culp.
 - the Health Dep't Officer is Marianne Nelson, M.D.
12. The Amended Petition identifies each of its petitioners as follows:
 - the Commission "is the executive and the legislative body of Jasper County, Indiana per IC 36-2-2-2 and IC 36-1-2-9(1), respectively." *Amended Petition*, p. 2.
 - the Health Dep't is "responsible for enforcing the health laws, ordinances, rules and

party's objection or request for modification. Neither party requested that this prehearing conference be conducted on the record, nor did the parties object to the Court's Report or seek its modification.

¹⁰ May 6, 2019 Report of Telephonic Prehearing Conference and Order to Submit Proposed Case Management Order.

¹¹ *Amended Petition*, p. 4.

- regulations of the Jasper County Board of Health and the Indiana State Department of Health.” *Id.*
- the Drainage Board “is the owner of the rights and powers of Jasper County under Indiana drainage law, IC 36-9-27 et seq.” *Id.*¹²

13. In their Amended Petition¹³, Petitioners collectively identify their aggrieved or adversely affected status as:

NIPSCO’s admitted groundwater exceedances at three of the surface impoundments at Schahfer and all four surface impoundments’ noncompliance with location restriction requirements creates a significant risk of adverse effects on public health and the environment within Jasper County, particularly including but not limited to contamination of county-regulated drains and wells. IDEM has granted to NIPSCO a variance from the deadlines established by 40 CFR 257.101(a)(1) and (b)(1)(i), which are incorporated by reference at 329 IAC 10-9-1(b), and which would ordinarily require NIPSCO to cease placing non-CCR waste streams into the four CCR surface impoundments at Schahfer by October 31, 2020. Under its grant of variance, IDEM has extended the deadline to July 30, 2023. Jasper County is aggrieved because the nearly three-year extension will result in continued placement of non-CCR waste streams into the impoundments at Schahfer for almost three additional years and will delay the inevitable cleanup of these facilities. The addition of these materials, the length of time over which they will be added, and the delay of cleanup aggravates the stated risk of adverse effects on public health and the environment within Jasper County, particularly but not limited to contamination of county-regulated drains and wells.

14. On August 15, 2019, Permittee/Respondent NIPSCO timely filed its Motion for Summary Judgment and supporting memorandum. Petitioners’ September 1, 2019 opposing memorandum included the Drainage Board’s motion to intervene. NIPSCO’s October 17, 2019, NIPSCO’s Reply included a request that the Drainage Board be denied intervention. IDEM’s October 17, 2019 Reply noted that IDEM¹⁴ was not taking a position as to whether Petitioners were aggrieved or adversely affected, but was providing an experienced perspective of the overall regulatory program applicable to the Variance. Permittee/Respondent NIPSCO’s November 1, 2019 Proposed Findings of Fact, Conclusions of Law and Final Order concluded the parties’ submissions.

¹² Petitioners also assert that these rights and powers are owned by the Commissioners. *Combined Petitioners’ Memorandum in Opposition to Intervenor NIPSCO’ Motion for Summary Judgment and Petitioner Jasper County Drainage Board’s Motion to Intervene* (“Petitioners’ Responsive Memo”), p. 11.

¹³ *Amended Petition*, p. 2, 3.

¹⁴ IDEM also opposed the Drainage Board’s petition as untimely filed.

15. Summary judgment briefing included sworn statements elicited through discovery, including interrogatories, requests for admission and NIPSCO's Tr. R. 30(b)(6) depositions of Petitioners' standing witnesses. The Commissioners, Health Dep't and Drainage Board responded jointly as Petitioners. On the issue of "standing"¹⁵, Petitioners defined their "adverse effects" as "contamination of county-regulated drains and wells." Petitioners averred that they had not tested the county-regulated drains, but stated that the Impoundments will fail and flood in to county-regulated drains in the next three years. As for private wells, Petitioners relied on testing conducted by the Indiana State Department of Health ("ISDH") and the county Health Dep't. The well testing detected no contamination by either CCR or non-CCR waste from the Site. Petitioners' support for their aggrieved or adversely affected status from the condition of private wells is based on the statement that a "risk of future contamination" "creates, per se, an unacceptable risk of harm to the environment and public health and safety."
16. Petitioners also presented testimony as to how they were individually aggrieved or adversely affected during Tr. R. 30(B)(6) depositions. Mr. Kendell Culp testified for Commissioners, stating that the Variance required NIPSCO to clean up the Impoundments by Oct. 31, 2020.¹⁶ When asked directly how the placement of non-CCR wastes into the Impoundments harms the public, Mr. Culp testified, "I'd say that's a question for IDEM. I mean, this is their rule so I think they are better qualified to answer than I am."¹⁷ In Interrogatory responses, Commissioners testified that they had no evidence that the county-regulated drains are actually contaminated.¹⁸ Commissioners identified specific county-regulated drains in the vicinity of the Site, but testified that it had not tested those drains to determine whether actual contamination exists.¹⁹ Commissioners further testified that they were not aware of any off-site releases of non-CCR waste from the Site.²⁰ Commissioners asserted future harm from an Impoundment breach, relying upon a NIPSCO consultant's report.²¹ However, a review of the report

¹⁵ The parties refer to whether a party is "aggrieved or adversely affected" as required in I.C. § 4-21.5-3-7(a)(1)(b) as "standing". As later discussion will provide, "standing" does not apply to OEA cases, but it is often used as a more convenient reference to the general concept of the sufficiency of a party's stake in the litigation of a particular case. "Aggrieved or adversely affected" bears some comparison to the general legal concept of personal jurisdiction.

¹⁶ *NIPSCO Memo*, Ex. E, Culp Dep., 44:21 – 45:9.

¹⁷ *Id.*, 48:8-13.

¹⁸ *Id.*, Ex. D., Interrogatory Response No. 29.

¹⁹ *Id.*, Response Nos. 28, 29.

²⁰ *Id.*, Ex. E., Culp Dep., 64:9 – 15.

²¹ *Id.*, Ex. D, Interrogatory Response 1; Ex. J, Golder Assocs., Inc., Hazard Potential Classification Assessment and Visual Inspection Report, p. 1(Sept. 26, 2016) . The consultant's report was prepared in response to a federal legal requirement.

supports NIPSCO's analysis that the report examines the potential damage which would result from an Impoundment failure, not the Impoundment dams' condition or potential to fail. Commissioners testified that there was no evidence that the county-regulated drains are contaminated.²² Commissioners assert that "it's kind of hard . . . to say X, Y and Z are gonna happen because we don't exactly know what all is gonna be impacted or impounded."²³ Commissioners' assertion that the Variance creates a significant risk of contamination of wells is based on past residential complaints of potential contamination which was disproved by private well testing²⁴ conducted by the Indiana State Department of Health and the Health Dep't.²⁵ The private testing concluded that wells were not contaminated from the NIPSCO Site.²⁶ Although Commissioners claim they are aggrieved or adversely affected because the Variance's extension of time will delay Site cleanup, they further state that they "do not know actually know how . . . continued placement of non-CCR waste stream delay[s] an inevitable cleanup."²⁷ Commissioners' claim that the Variance creates a *per se* unacceptable risk of harm to the environment and public health and safety", is based on past determinations that the Impoundments do not meet all local restrictions in the federal CCR rule (which determination led NIPSCO to elect closure), but do not present evidence further explaining the risk or how the Variance changes that risk. As stated in Mr. Culp's deposition:

Q: What do you mean by the phrase, *per se* unacceptable risk of harm?

A: . . . [I]t's meant to be a general statement but to show there's still environmental concerns and hazards there on the property."²⁸

17. Commissioners further assert that they are the owners of the rights and powers of Jasper County under Indiana drainage law.²⁹

18. The Health Department presented testimony as to how it was individually aggrieved or adversely affected during Tr. R. 30(B)(6) depositions of its head sanitarian, Michelle Taylor.³⁰ Ms. Taylor characterized the Health Dep't's petition for administrative review

²² *Id.*, Ex. D, Interrogatory Response 29(b).

²³ *Id.*, Ex. E, Culp Dep., 65:3-11.

²⁴ *Id.*, 54:2-22, 54:9-16.

²⁵ *NIPSCO Memo*, Ex. F, Taylor Dep., 29:23 – 30:7.

²⁶ *Id.*, Ex. D, Interrogatory Response No. 30; Ex. K, Sarah Reese, *The Times of NW Ind.*, *Contamination found in some Wheatfield wells not from NIPSCO, nonprofit says* (Sept. 17, 2018).

²⁷ *Id.*, Ex. E, Culp Dep., 83:10-13.

²⁸ *Id.*, Ex. E., Culp Dep., 65:3-23.

²⁹ *Petitioners' Responsive Memo*, p. 11.

³⁰ *NIPSCO Memo*, Ex. F, Taylor Dep.

as “petitioning NIPSCO for the groundwater exceedants of surface impoundments for noncompliance”.³¹ The Health Dep’t did not distinguish the CCR and non-CCR waste streams, and testified that it had no concerns related to the Variance.³² The Health Dep’t testified that it has no state or county law requirement to take responsibility to investigate, clean up, or bring enforcement action for the types of harm it avers in its Amended Petition regarding private wells.³³ Ms. Taylor stated that groundwater contamination issues coming from a “commercial property” such as the NIPSCO Site would be handled by the “State or IDEM . . . [I]t’s not something that the Jasper County Health Department would handle.”³⁴ The Health Dep’t testified that it did not “have an understanding as to how the cleanup of the surface impoundments are delayed by the [V]ariance.”³⁵

CONCLUSIONS OF LAW

1. The Indiana Department of Environmental Management (“IDEM”) is authorized to implement and enforce specified Indiana environmental laws, and relevant rules, per Ind. Code § 13-13, *et seq.* The Office of Environmental Adjudication (“OEA” or “Court”) has jurisdiction over the decisions of the Commissioner of IDEM and the parties to this controversy, per I.C. § 4-21.5-7, *et seq.*, and I.C. § 4-21.5-3-7(a)(1)(A).
2. Matters before OEA are subject to procedures stated in I.C. § 4-21.5-3, *et seq.*³⁶ and 315 IAC 1, *et seq.* This is a final order pursuant to I.C. § 4-21.5-3-23, I.C. § 4-21.5-3-27 and 315 IAC 1-2-1(9). Findings of Fact that may be construed as Conclusions of Law, or Conclusions of Law that may be construed as Findings of Fact, are so deemed.
3. 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 ELJ, and deference to the agency’s initial factual determination is not allowed. *Id.*; I.C. § 4-21.5-3-27(d). “*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

³¹ *Id.*, 21:19-25

³² *Id.*, see also 18:12-16, 24:8-17(no concerns about on-Site or off-Site groundwater releases), 51:8-10 (no groundwater contamination concerns), 48:10-12 (public should not be concerned about well contamination), 29:23 – 30:3 and 48:2-9 (no further private well testing, for lack of public complaint), 48:21-23 (no generalized concerns).

³³ *Id.*, 26:1 – 30:19.

³⁴ *NIPSCO Memo, Ex. F, Taylor Dep.* 27:22 – 28:2.

³⁵ *Id.*, 49:14 – 17.

³⁶ I.C. § 4-21.5-3, *et seq.*, is referred to as the Administrative Orders and Procedures Act, or “AOPA”.

previous findings.” *Grisell v. Consol. City of Indianapolis*, 425 N.E.2d 247 (Ind. Ct. App. 1981).

4. 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. Trial Rule 56 states, “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.” The Indiana Supreme Court in *Hughley v. State*, 15 N.E.3d 1000, 1003 -1004 (Ind. 2014) instructed:

Drawing all reasonable inferences in favor of . . . the non-moving parties, summary judgment is appropriate ‘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 judgment as a matter of law.’” *Williams v. Tharp*, 914 N.E.2d 756, 761 (Ind. 2009) (quoting T.R. 56(C)).

...

The initial burden is on the summary-judgment movant to “demonstrate the absence of any genuine issue of fact as to a determinative issue,” at which point the burden shifts to the non-movant to “come forward with contrary evidence” showing an issue for the trier of fact. *Id.* at 761–62.

...

Summary judgment is a desirable tool to allow the trial court to dispose of cases where only legal issues exist. But it is also a blunt instrument by which the non-prevailing party is prevented from having his day in court. We have therefore cautioned that summary judgment “is not a summary trial,” *Id.* (internal quotation marks omitted); and the Court of Appeals has often rightly observed that it “is not appropriate merely because the non-movant appears unlikely to prevail at trial.” *Tucher v. Brothers Auto Salvage Yard, Inc.*, 564 N.E.2d 560, 564 (Ind. Ct. App. 1991), trans. denied; see also *LaCava v. LaCava*, 907 N.E.2d 154, 166 n.9 (Ind. Ct. App. 2009) (recognizing that the decedent’s “claim should withstand summary judgment” despite counsel’s “concession . . . that he will be unlikely to prevail” at trial). In essence, Indiana consciously errs on the side of letting marginal cases proceed to trial on the merits, rather than risk short-circuiting meritorious claims.

5. Further, when considering the evidence presented, “Mere assertions of opinions or conclusions of law will not suffice to create a genuine issue of material fact to preclude summary judgment.” *Sanchez v. Hamara*, 534 N.E.2d 756, 759 (Ind. Ct. App. 1989) (citing *McMahan v. Snap On Tool Corp.*, 478 N.E.2d 116, 122 (Ind. Ct. App. 1985)); see also *In Re: Blue Chip Casino*, 2004 OEA 109, 120, 121.³⁷ “Summary judgment must be

³⁷ In *Blue Chip Casino*, OEA held that petitioners’ claims of economic harm and health threats due to the issuance of a water quality certification were “stated in potential, speculative, remote terms” in reliance upon “subjective,

denied if the resolution hinges upon state of mind, credibility of the witnesses, or the weight of the testimony. Mere improbability of recovery at trial does not justify the entry of summary judgment against the plaintiff.” *Best Homes, Inc. v. Rainwater*, 714 N.E.2d 702, 706 (Ind. Ct. App. 1999).

6. On summary judgment, Permittee/Respondent NIPSCO seeks dismissal of Petitioner Drainage Board, for the Drainage Board’s addition as party by Petitioners Commissioners and Health Dep’t in their June 5, 2019 Amended Petition. Based on the dates of the May 6, 2019 Prehearing Conference and the June 5, 2019 Amended Petition, Petitioners Commissioners and Health Dep’t could amend their initial, timely January 28, 2019 Petition of the January 11, 2019 Variance to add issues, not parties. I.C § 4-21.5-3-7(a)(2), 315 IAC 1-3-2(e).
7. Petitioners argue that lack of service of IDEM’s issuance of the NIPSCO Variance³⁸ prevented the Drainage Board’s timely petition for administrative review. The Variance was copied on the Health Dep’t, the Commissioners, and the Jasper County Solid Waste Board.³⁹ Petitioners identify “the owner of the rights and powers of Jasper County under Indiana drainage law” as the Drainage Board⁴⁰ and as the Commissioners.⁴¹ Further, Commissioners and the Drainage Board identify the same three individuals as their members.⁴² Throughout this matter, Petitioners have been represented by the same legal counsel, who serves as the county attorney⁴³. The Drainage Board was served constructively with the January 11, 2019 Variance.
8. All three Petitioners further assert that issues may be added to an initial petition on amendment, and that such amendments relate back to the initial timely-filed petition. However, AOPA sets a more specific time frame for filing petitions: fifteen to eighteen days of the agency action for which appeal is sought. I.C. § 4-21.5-3-7(a)(3). The

uncorroborated viewpoints.”. Procedurally, in *Blue Chip Casino*, responding permittee filed its Tr. R. 12(B)(6) Motion challenging petitioners’ aggrieved or adversely affected status on the morning of a two-day final hearing setting, asking that the evidence elicited at the final hearing be incorporated to support its Motion. Approximately a half day of evidence taken, subject to cross-examination, related to whether petitioners were aggrieved or adversely affected.

³⁸ *Petitioners’ Responsive Memo*, p. 11.

³⁹ *NIPSCO Memo*, Ex. C, p. 5.

⁴⁰ *Amended Petition*, p. 4.

⁴¹ *Petitioners’ Responsive Memo*, p. 11.

⁴² *Amended Petition*, p. 4.

⁴³ *Petition*, cover letter.

Drainage Board first petitioners for administrative review of the January 11, 2019 Variance on June 5, 2019, in excess of the period for timely filing set by AOPA. For lack of timely filing, Petitioner Drainage Board's petition for administrative review stated in the petitioners' June 5, 2019 Amended Petition of the January 11, 2019 Variance should be dismissed.

9. As an entity whose petition for administrative review is denied, the Drainage Board's petition shall be treated as a petition for intervention. When "a petition for administrative review is denied, the petition shall be treated as a petition for intervention in any review initiated under subsection (d)". I.C. § 4-21.5-3-7(a). The Drainage Board's petition for intervention is to be addressed after the issue is resolved as to whether Petitioners Commissioners and Health Dep't are aggrieved and adversely affected, so as to invoke OEA's jurisdiction for administrative review of the Variance.
10. Permittee/Respondent NIPSCO⁴⁴ seeks summary judgment on the issue of whether Petitioners' have "standing" to challenge to the Variance issued per I.C. § 13-4-8-8. In other words, the issue is whether the Petitioners are the proper persons "to invoke the OEA's power of administrative review of IDEM's . . . decision" under the Administrative Orders and Procedures Act ('AOPA'), I.C. §4-21.5-3 *et seq.*, to bring this action. *Huffman v. Indiana Office of Environmental Adjudication*, 811 N.E.2d 806, 808 (Ind. 2004)⁴⁵.
11. The parties dispute whether a party must prove that it is aggrieved or adversely affected in order to invoke OEA's jurisdiction. Petitioners assert OEA's jurisdiction is met because the Amended Petition complains against the IDEM Variance, which addresses requisite subject matter jurisdiction before OEA.⁴⁶ As OEA has subject matter jurisdiction over challenges to IDEM decisions, then OEA has jurisdiction over Petitioners' challenge to IDEM's issuance of the Variance. However, NIPSCO correctly argues that, per AOPA, Petitioners must also demonstrate that they are aggrieved or adversely affected by the decision for which they seek review, as required in I.C. § 4-21.5-3-7(a)(1)(B)(1998). A party which does not meet the standard of "aggrieved or adversely affected" is not entitled to seek administrative review. *Nat'l Wine & Spirits Corp. v. Ind. Alcohol & Tobacco Comm'n*, 945 N.E.2d. 182, 185, 186, Ind. Ct. App.

⁴⁴ IDEM did not take a position as to whether Petitioners were aggrieved or adversely affected by its issuance of the Variance to NIPSCO.

⁴⁵ *Huffman* distinguished the procedures to review a party's right to invoke administrative review. A Tr. R. 12(B)(1) challenge to subject matter jurisdiction, which when applied to OEA, requires that the underlying decision be one made by IDEM. A Tr. R. 12(B)(6) challenge asserting failure to state a claim upon which relief can be granted, for lack of sufficient aggrieved or adversely affected status, is determined by examining the face of a party's complaint. As is present here, the issue of aggrieved or adversely affected status is determined on matters outside the pleadings, and is treated as a motion for summary judgment under Tr. R. 56. *Id.* at 806, 812, 813.

⁴⁶ *Petitioners' Responsive Memo*, p. 5

2011) (*trans.den.*). Whether Petitioners here are aggrieved or adversely affected is a jurisdictional issue before OEA in this case.

12. Petitioners further argue they are relieved from establishing their personal jurisdiction as to whether Petitioners are aggrieved or adversely affected because that issue is merely stated in the Court's May 29, 2019 scheduling order as "jurisdiction", and should thus be considered with the merits of the case, after further discovery and expert disclosure.⁴⁷ Petitioners may not have noted that the Court's Report of Prehearing Conference specifically referenced the statute and concept of "aggrieved or adversely affected" as relevant to jurisdiction. Despite Petitioners' understanding derived from the language relied upon from the Court's scheduling order, Petitioners were on notice that the issue as to whether they were aggrieved or adversely affected was of concern the Court. As noted in the above paragraph, a party's personal jurisdiction is not subject to waiver by the Court.
13. In *Huffman v. Indiana Office of Environmental Adjudication*, 811 N.E.2d 806, 813 (Ind. 2004), the Indiana Supreme Court held that in order to seek administrative review, a person must be "aggrieved or adversely affected" and expressly distinguished this standard from "standing." In essence, to be "aggrieved or adversely affected,"

a person must have suffered or be likely to suffer in the immediate future a harm to a legal interest, be it a pecuniary, property, or personal interest. *Id.* at 810. *Black's Law Dictionary* (9th ed.2009), defines "aggrieved" as "having legal rights that are adversely affected." "[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.
14. An "aggrieved or adversely affected" person must have a legal right that is adversely affected; have a substantial grievance, a denial of some personal, pecuniary, or property right, or the imposition of a burden or obligation; have a legal interest which will be enlarged or diminished; or have suffered or be likely to suffer in the immediate future harm to a legal interest, be it a pecuniary, property, or personal interest. *Id.* at 810 (citing *Bagnall v. Town of Beverly Shores* 726 N.E.2d 782, 786 (Ind. 2000) and *McFarland v. Pierce*, 45 N.E. 706, 706-07 (Ind. 1897)). The alleged harm must be specific to the person and not arise as "a generalized concern as a member of the public." *Huffman* at 812; see also *Shoremnet LLC*, 2016 OEA 18, 23. Allegations that a party "must have suffered or be likely to suffer in the immediate future" must be supported by evidence. *In Re: Liberty Mine, LLC*, 2017 OEA 45, 58. (petitioner did not present evidence of the permitted discharge levels' impact on the fish and wildlife he enjoys, and at the different points in the watershed he identified).

⁴⁷*Petitioners' Responsive Memo*, p. 5

15. In support of summary judgment, Huffman's opposing parties asserted that the disputed discharge "did not even touch the property", a fact to which Huffman did not respond. *Huffman* at 814. The Huffman court held that "this is precisely the type of fact that needs further development before it can be resolved." *Id.* at 815.
16. At issue is whether a genuine issue of material fact exists as to whether Petitioners Commissioners and Health Dep't are aggrieved or adversely affected by the Variance so as to invoke administrative review before OEA. Whether Petitioners are aggrieved or adversely affected is limited to the scope of the Variance, which, in sum, authorizes placement of non-CCR waste into the Impoundments to continue through July 23, 2023, instead of through October 31, 2020.
17. Petitioners summarize that they are aggrieved or adversely affected "because the nearly three-year extension will result in continued placement of non-CCR waste streams into the impoundments at Schahfer for almost three additional years and will delay the inevitable cleanup of these facilities. The addition of these materials, the length of time over which they will be added, and the delay of cleanup aggravates the stated risk of adverse effects on public health and the environment within Jasper County, particularly but not limited to contamination of county-regulated drains and wells."⁴⁸
18. Through Petitioners' responses to Respondent NIPSCO's discovery, Petitioners state conclusions in conflict with the Amended Petition, with limited evidentiary support. NIPSCO has established that some of Petitioners' opposition to the Variance is actually opposition to Impoundment conditions which were addressed by NIPSCO's election of Impoundment closure. NIPSCO has also established that Petitioners mistakenly construe the Variance as authorizing a cleanup delay, and as allowing an extension of CCR waste deposit. Such allegations are not within the scope of the Variance, and are not therefore proper subjects for administrative review.
19. Petitioners further argue that as the Variance is not an actual IDEM permit, the permit cases relied upon by NIPSCO are not applicable to support NIPSCO's summary judgment.⁴⁹ The Variance which IDEM issued to NIPSCO is clearly an "agency action", as defined and discussed throughout AOPA, I.C. § 4-21.5, *et seq.* To the extent that cases analyzing IDEM's agency actions in the form of permitting are germane to IDEM's agency actions in the form of its issue of Variances, "permitting" cases are relevant to this case.
20. Petitioners further argue they are aggrieved or adversely affected by the Site's past adverse onsite groundwater levels and failure to fulfill all five location restrictions, which

⁴⁸ *Amended Petition*, p. 2, 3.

⁴⁹ *Petitioners' Responsive Memo*, p. 7.

supports an inference that future adverse effects will occur. Petitioners rely upon NIPSCO's Ex. J, Golder Assocs., Inc., Hazard Potential Classification Assessment and Visual Inspection Report (Sept. 28, 2016) to specify drains and ditches which would be impacted should the Impoundment fail. Petitioners assert a *per se* unacceptable risk of harm to the environment and public health and safety, as noncompliance existed and may continue, and the Variance may result in a cleanup delay.⁵⁰ Petitioners incorrectly characterize Impoundment exceedance of groundwater protection standards and noncompliance with local restrictions as noncompliance with the CCR rule.⁵¹ Instead, these conditions triggered additional rule requirements, include the closure in process by NIPSCO. Petitioners' *per se* theory is not supported by *Huffman* or other current case law, is contrary to case law prohibiting the inference of past noncompliance as proof of future violation, and is contrary to statutory and case law authority requiring each petitioner to demonstrate that they are individually aggrieved or adversely affected.

21. Petitioners have shown that OEA has subject matter jurisdiction over Petitioners' petition (and amendment) for administrative review of an IDEM action. Petitioners must also show that OEA has a form of "personal jurisdiction" over Petitioners' complaints by establishing that Petitioners are aggrieved or adversely affected by the Variance. Respondent NIPSCO challenged Petitioners' subject matter jurisdiction on summary judgment, supported by evidence elicited in sworn discovery from Petitioners' designated witnesses. Petitioners did not provide much responsive evidence, as they incorrectly argued that their personal jurisdiction did not rely upon whether they were aggrieved or adversely affected, that they had sufficiently supported that they were aggrieved or adversely affected, and that any deficiency in proof could be corrected during a hearing on substantive issues. OEA's examination as to whether Petitioners have properly invoked OEA's jurisdiction is limited to the scope of the Variance, which, in sum, authorizes placement of non-CCR waste into the Impoundments to continue through July 23, 2023, instead of through October 31, 2020. When applied most favorably to non-movant Petitioners, per *Huffman*, no genuine issue of material fact exists that Petitioners Commissioners and Health Dep't have failed to show that they have suffered or are likely to suffer in the immediate future a harm to a pecuniary, property or personal legal interest; a personalized harm versus a generalized concern which is likely to be suffered in the immediate future. For lack of genuine issues of material fact, NIPSCO's motion for summary judgment as to Petitioners Commissioners, Health Dep't and Drainage Board should be granted.

FINAL ORDER

For all of the foregoing reasons, **IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that the Respondent Northern Indiana Public Service Company R. M. Schafer

⁵⁰ *Id.*, p. 8, 9, 10.

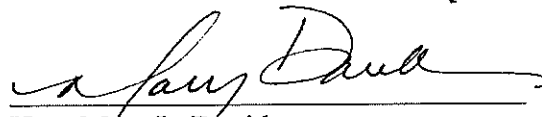
⁵¹ *Id.*, p. 9.

Generating Station's Motion for Summary Judgment is **GRANTED** as to whether petitioners Board of Commissioners of Jasper County, Indiana, Jasper County Health Department are aggrieved or adversely affected, so as to invoke administrative review before the Office of Environmental Adjudication.

IT IS FURTHER ORDERED THAT Petitioner Jasper County Drainage Board Drainage Board's petition for administrative review stated in the petitioners' June 5, 2019 Amended Petition of the January 11, 2019 Variance is **DISMISSED** as untimely filed. Petitioner Jasper County Drainage Board Drainage Board's petition for intervention stated in the petitioners' June 5, 2019 Amended Petition of the January 11, 2019 Variance is **DENIED**, due to dismissal of the petition into which Jasper County Drainage Board seeks to intervene.

You are further notified that pursuant to provisions of IC §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 IC 4-21.5, *et seq.* 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 13th day of February, 2020 in Indianapolis, IN.


Hon. Mary L. Davidsen
Chief Environmental Law Judge

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