STATE OF INDIANA	)	BEFORE THE INDIANA OFFICE OF
	)	ENVIRONMENTAL ADJUDICATION
COUNTY OF MARION	)	
	)	CAUSE NO. 22-A-J-5216
IN THE MATTER OF:	)	
	)	
OBJECTION TO THE ISSUANCE OF FESOP – NEW SOURCE CONSTRUCTION MINOR (PSD/EO) PERMIT NO. 089-44042-00660 TO FULCRUM CENTERPOINT, LLC GARY, LAKE COUNTY, INDIANA	)	
	)	
GARY ADVOCATES FOR RESPONSIBLE DEVELOPMENT, Dorreen Carey, Kimmie Gordon, Carolyn McCrady, Sy Moskowitz, Jennie Rudderham, Natalie Ammons, and Carmencita McKee Petitioners,	)	
	)	
FULCRUM CENTERPOINT, LLC, Permittee/Respondent,	)	
	)	
INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, Respondent.	)	

PETITIONERS' RESPONSE TO
FULCRUM CENTERPOINT'S MOTION TO COMPEL

Fulcrum Centerpoint served each of the eight Petitioners with 76 formal discovery requests – a total of 607 requests – in which it asked for such intrusive and irrelevant information as the name and date of birth of each Petitioner's spouse, the name and address of their employer, and all communications they have ever had with anyone about Fulcrum. Petitioners provided detailed objections to each of the discovery requests and substantive responses. Now, four months later, Fulcrum asks this Court to order Petitioners to provide further responses to 184 of its 607 discovery requests. Fulcrum insists that it has the right to conduct this intrusive discovery on private citizens to search for information that it believes may somehow defeat

Petitioners' administrative standing, even though this Court has already held that two of the Petitioners are "aggrieved or adversely affected," *see* Order of December 21, 2022, and it takes only *one* Petitioner with standing for this case to proceed. *Sierra Club v. Franklin Cty. Power of Ill., LLC*, 546 F.3d 918, 924 (7th Cir. 2008).

Fulcrum did not move to reconsider the Court's decision on administrative standing, yet argues that it has the right to demand answers to its intrusive inquiries in an unlimited effort to discover evidence that may contradict Petitioners' allegations of administrative standing.[1] None of the information requested would actually prove or disprove whether the Petitioners are aggrieved or adversely affected and is, thus, outside the permissible scope of discovery. Nevertheless, in an attempt to cooperate, each Petitioner provided detailed and supported objections and substantive responses to Fulcrum's improper discovery requests, and produced responsive documents.

Not satisfied with Petitioners' responses, Fulcrum now seeks the Court's intervention to impose further undue burden on Petitioners without having first made a reasonable effort to resolve the discovery dispute with Petitioners. Condoning this behavior will embolden Fulcrum to further abuse discovery and divert the Court's attention from the central issue in this case – whether the Indiana Department of Environmental Management ("IDEM") properly issued a Federally Enforceable State Operating Permit ("FESOP") to Fulcrum to construct and operate a "biorefinery" in the city where Petitioners live.

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[1] For example, in Interrogatory 5, Fulcrum demands that each individual Petitioner identify their: "a. Date of birth; b. Current address; c. Employer; d. Employer's address; e. Present occupation, nature of duties performed, and how long you have been so employed; and f. Spouse's full name and date of birth." In response, Petitioners provided their address, which is relevant to whether they are aggrieved or adversely affected, but objected to the remainder of the interrogatory as intrusive and entirely irrelevant to any issue in this case.

As discussed below, Fulcrum's motion to compel should be stricken for failing to comply with the mandatory prerequisites set forth in Tr. R. 26(F). On the merits, the motion to compel should be denied because the discovery sought is wholly irrelevant to any issues in this matter. Furthermore, the undue cost and burden imposed on Petitioners in having to further respond to Fulcrum's voluminous, intrusive, and unnecessary discovery far outweighs any theoretical relevance it may have. Fulcrum's motion is an abuse of the justice system to intimidate seven people who are simply trying to protect their right to breathe clean air.

I. BACKGROUND

Claims and Parties

Fulcrum is a California corporation that wants to construct a large biorefinery in Gary, Indiana. When constructed on 75 acres within view of Lake Michigan, the planned refinery will be permitted to receive daily truckloads of 1,650 tons of household and commercial wastes that have been processed at two other facilities. This processed trash will be "gasified," or baked, in three ovens designed to drive off volatile organics and create a synthetic gas ("syngas") that will then be cleaned and cooled into a liquid. According to Fulcrum, if everything works right, the liquid can then be refined and processed into a transportation fuel. The sheer volume of throughput – i.e., "gasifying" 1,650 tons of processed trash every day – results in the potential to emit more than 1,400 tons of volatile organic compounds ("VOCs") each year.[2] In comparison, BP's largest U.S. refinery in nearby Whiting reported 488 tons of VOC emissions in 2022. *See* 2022 Air Emission Statement Certification, BP Products North America, Inc. Whiting Refinery (VFC #83499406).

[2] *See* PTE Summary Table, Appendix A to Addendum to Technical Support Document, in FESOP 089-44042-00660 (VFC #83357534) ("PTE Summary Table").

In April 2022, Fulcrum applied for a Clean Air Act permit with IDEM. Based on the large quantity of VOCs, particulate matter, and other pollutants that the facility can produce, Fulcrum would need a "major source" permit under Title V of the Clean Air Act. Fulcrum instead applied for a less onerous "synthetic minor source" permit, referred to as a Federally Enforceable State Operating Permit or "FESOP" by estimating its controlled emissions to be just below the major source thresholds. *See* PTE Summary Table. The basis for many of these calculations – the "emissions factor" or the estimated amount of a pollutant in a given volume of air – were provided to IDEM by Fulcrum without any supporting evidence. On August 16, 2022, IDEM issued the FESOP, accepting all of Fulcrum's unsupported estimates of emissions calculations.

Petitioners are long-time residents of Gary and Lake County, Indiana. Petitioners include a former Gary public school teacher, a former steelworker and long-time employee of Gary city government, two mothers raising young children in Gary, and an urban gardener growing a healthier future for Gary residents. Some of these Petitioners banded together in 2021 to form Gary Advocates for Responsible Development ("GARD"). Earlier this year, they incorporated GARD as an Indiana non-profit for the purpose of "promoting economic development in the city of Gary, Indiana, that prioritizes environmental sustainability." *See* Exhibit 1 (GARD Articles of Incorporation). As residents of Gary, Petitioners are reasonably concerned about the siting of such a large additional source of air pollution in their community. To assuage public concerns, Fulcrum repeatedly told residents that it had built and would be operating a similar, smaller biorefinery in Nevada, but has provided little evidence as to whether that operation has been successful or safe.

Procedural History

On September 6, 2022, Petitioners filed a timely petition for review of IDEM's FESOP decision, proceeding without counsel. On December 16, 2022, Petitioners filed their Amended Petition after retaining undersigned counsel. On the same day, Petitioners Natalie Ammons and Carmencita McKee filed their Petition for Intervention, which included their sworn affidavits listing their home addresses and detailing some of their concerns as well as activities they engage in near the site of the proposed Fulcrum facility. On December 21, 2022, this Court granted the Petition for Intervention, finding that the affidavits of Ms. Ammons and Ms. McKee demonstrated "that they are both 'aggrieved or adversely affected' as that phrase is used in Ind. Code § 4-21.5-3-21(a)(2)." Fulcrum has not moved for reconsideration or otherwise challenged their administrative standing.

At the outset of the case, the Court set a discovery deadline for April 14, 2023. *See* Case Management Order of November 16, 2022. To meet this deadline, Petitioners served written discovery on both Fulcrum and IDEM on December 30, 2022 – two weeks after filing their Amended Petition – seeking information about Fulcrum's process including its two prior attempts to build similar facilities, the bases for its emissions estimates, and what information it provided IDEM. Fulcrum produced its correspondence with IDEM, but largely refused to answer any discovery regarding its process and attempts to build similar facilities claiming that much of the information is proprietary. Fulcrum also insisted that a protective order was necessary to prevent disclosure of information beyond Petitioners' counsel – a demand that Petitioners believe was unwarranted, but agreed to in an attempt to cooperate. On February 20, 2023, Petitioners moved to compel Fulcrum to respond to certain interrogatories and document requests. The Court granted the motion to compel in part and denied it in part, concluding that information

post-dating Fulcrum's FESOP application could not have been a basis for IDEM's decision to issue the FESOP and, thus, not reasonably calculated to lead to the discovery of admissible evidence – i.e., outside the scope of permissible discovery. *See* Order Granting in Part and Denying in Part Petitioners' Motion to Compel, at 3 (May 8, 2023).[3]

Meanwhile, Fulcrum waited until February 8, 2023 – more than 7 weeks after receipt of Petitioners' Amended Petition – to propound discovery on Petitioners. Fulcrum's discovery is voluminous: 6 requests for production of documents, 37 interrogatories, and 33 requests for admission to each Petitioner, for a total of 607 separate discovery requests. Each Petitioner timely responded to each request on March 10, 2023. Although the discovery requests were identical for each Petitioner, the objections and responses had to be tailored to each Petitioner, reviewed by each Petitioner, and interrogatories verified by each Petitioner. This was an intimidating and daunting process for Petitioners because most of them had never encountered the formal discovery process. Even so, a search was made of each Petitioner's paper and computer files for documents and emails. In all, Petitioners produced 241 pages of responsive documents to Fulcrum on March 21, 2023.

Shortly after Petitioners responded to Fulcrum's discovery, the Court extended the deadline to complete discovery to June 30, 2023. *See* Amended Case Management Order of March 13, 2023. Inexplicably, Fulcrum waited until May 11, 2023 – over two months after receiving Petitioners' discovery responses – to serve its Rule 26(F) letter demanding additional responses to 2 of its 6 requests for production of documents, 23 of its 37 interrogatories, and 6 of

[3] IDEM responded to two sets of discovery requests from Petitioners and propounded no discovery of its own. Petitioners and IDEM resolved their discovery disputes without intervention from the Court.

its 33 requests for admission. *See* Fulcrum Centerpoint LLC's Motion to Compel, Exhibit 1 (hereinafter "Fulcrum Motion").

On May 17, 2023, Fulcrum's counsel scheduled a one-hour videoconference for the following week, on May 24, 2023. *See* Exhibit 2 (Discovery Conference invitation for May 24, 2023 between 1:30 to 2:30 pm). During that one-hour remote meeting, the parties began discussing the disputed discovery requests in the order identified in Fulcrum's lengthy 26(F) letter. Fulcrum's attorney Jackson Schroeder led the discussion. At the end of the hour, and far from completing all of Fulcrum's 26(F) letter, Fulcrum's attorney Bradley Sugarman announced that he had another meeting and would drop off, but that Mr. Schroeder could continue the discussion if everyone's schedule allowed. However, the meeting abruptly terminated when Mr. Sugarman left the videoconference. Petitioners' counsel immediately tried to reconnect with Mr. Schroeder, but received no response other than Mr. Sugarman's apology for terminating the videoconference when he "jumped off." *See* Exhibit 3 (email exchange of May 24-25, 2023).

The following day, Petitioners' counsel again offered a time to continue efforts to reach agreement on discovery. *Id.* However, counsel for Fulcrum remained silent. *See* Fulcrum Motion, Exhibit 2. Accordingly, on June 16, 2023, Petitioners provided a written response to Fulcrum's 26(F) letter to encourage completion of the parties' 26(F) negotiations and to advise Fulcrum of Petitioners' positions. *Id.* Thereafter, Fulcrum made no further efforts to resolve its discovery disputes. Instead, Fulcrum waited over a month (just six weeks before the close of discovery) to move to compel each Petitioner to provide further responses to 2 production requests, 18 interrogatories, and 3 requests for admission. The Court should not allow it.

II. ARGUMENT

A. The Motion to Compel Should be Stricken for Failing to Comply with Trial Rule 26(F)

Indiana Trial Rule 26(F) serves to limit the time that courts must devote to resolving discovery disputes by encouraging the parties to make reasonable attempts to resolve the disputes themselves. *See Howard v. Dravet*, 813 N.E.2d 1217, 1223 (Ind. Ct. App. 2004). Compliance with Trial Rule 26(F) is mandatory. *Whitaker v. Becker*, 960 N.E.2d 111, 113 n.2 (Ind. 2012). Where the movant fails to comply with Rule 26(F), the Court may deny the motion to compel and impose other sanctions. *Walker v. McCrea*, 725 N.E.2d 526, 531-32 (Ind. Ct. App. 2000). Trial Rule 26(F) requires a party moving to compel discovery to: (1) first make a reasonable effort to reach agreement with the opposing party concerning the subject of the motion to compel, and (2) include a statement in the motion reciting "the date, time and place" of the reasonable effort and "the names of all parties and attorneys participating therein." Fulcrum did neither of these things.

The one-hour videoconference convened by Fulcrum was not a reasonable effort to resolve the parties' many disagreements over Fulcrum's voluminous discovery requests. Indeed, Fulcrum's 26(F) letter spans 20 pages and the parties got through less than half of it before the videoconference was abruptly terminated by Fulcrum. Futility is no defense for Fulcrum's failure to reconvene the meeting for at least two reasons. First, further discussion would likely have resulted in at least a reduction in the number of discovery disputes for the Court to resolve. For that matter, there are five interrogatories and three requests for admission that Fulcrum insisted in its Rule 26(F) letter required further response, but which Fulcrum does not mention in its motion to compel. In addition, Petitioners supplemented their answers to Interrogatory 7, which was not discussed during the Rule 26(F) conference. *See* Fulcrum Motion, Exhibits 33-40. But

futile or not, Trial Rule 26(F) mandates that Fulcrum make a reasonable effort to resolve its discovery disputes with Petitioners before involving the Court. Fulcrum did not and, thus, the Court should strike Fulcrum's motion.

After the parties' Rule 26(F) videoconference abruptly terminated, Petitioners' counsel made three attempts to reconvene the meeting to complete the parties' discussions. Petitioners made themselves available to explain their objections and discuss what information Fulcrum felt it needed for this petition for review. In doing so, Petitioners' noted that "Fulcrum has not satisfied Rule 26(F) to seek to compel supplemental responses from Petitioners on all of the requests contained in your May 11 letter." *See* Fulcrum Motion, Exhibit 2. Fulcrum's half-hearted and incomplete effort to resolve the parties' discovery disputes demonstrates that its use of formal discovery was never about obtaining relevant evidence, but in harming Petitioners.

B. Fulcrum's Motion to Compel Should be Denied Because the Discovery Sought is Not Relevant or Proportional to the Needs of the Case

Indiana courts "allow a liberal discovery procedure" to provide litigants "with information essential to the litigation of all relevant issues, eliminate surprise and to promote settlement." *Doherty v. Purdue Props. I, LLC*, 153 N.E.3d 228, 235 (Ind. Ct. App. 2020) (quoting *Canfield v. Sandock*, 563 N.E.2d 526, 528 (Ind. 1990)). This broad discovery, however, is limited by relevance and proportionality. *See* Tr. R. 26(B)(1). Discovery is not a "ticket . . . to an unlimited, never-ending exploration of every conceivable matter that captures an attorney's interest." *U.S. ex rel. Robinson v. Indiana University Health Inc.*, 13-cv-2009, 2016 WL 10570221, *2 (S.D. Ind. Aug. 29, 2016) (quoting *Uppal v. Rosalind Franklin Univ. of Med. & Sci.*, 124 F. Supp. 3d 811, 814 (N.D. Ill. 2015) (Cole, Mag. J.)); *see also Northern Indiana Public Serv. Co. v. Platt Env. Servs., Inc.*, 09cv164, 2010 WL 11583108, * 2 (N.D. Ind. Jan. 20, 2010) ("Discovery under Rule 26 is not an invitation to the proverbial fishing expedition."). Yet

that is precisely what Fulcrum's discovery is – a fishing expedition into the private lives of citizens who are simply questioning whether a state government agency did its job of protecting them from unlawful air pollution.

1. The Limited Issues Relevant in this Petition for Review

Petitioners have alleged three technical deficiencies in IDEM's decision to issue the FESOP to Fulcrum. Resolving these deficiencies will either correct or verify IDEM's compliance with Indiana's Clean Air Act regulations and serve to ensure that new sources of air pollutants are not a threat to public health. The Court has already found that information unrelated to IDEM's decision to issue the FESOP is irrelevant. *See* Order of May 23, 2023. Not one of Fulcrum's discovery requests is probative of that central question. This is not surprising because Petitioners were not involved in IDEM's decision to issue the FESOP. Only Fulcrum, the FESOP applicant, was so involved and, thus, has all of the information it needs to defend its permit.[4] Nevertheless, instead of sticking to the merits of Petitioners' claims, Fulcrum propounded extensive discovery on Petitioners aimed at discouraging these local residents from questioning whether the state agency charged with protecting them from pollution did so here.

In its motion to compel, Fulcrum admits that it "[m]ainly . . . seeks material relating to administrative standing." Fulcrum Motion, at 2. To qualify for administrative review of an agency order, a person must state facts demonstrating that the petitioner is "aggrieved or adversely affected" by the agency's order. Ind. Code § 4-21.5-3-7(a)(1)(B); *Huffman v. Office of Envtl. Adjudication*, 811 N.E.2d 806, 810 (Ind. 2004). To be "aggrieved," a person must have "a substantial grievance, a denial of some personal or property right, the imposition of a burden or

[4] Indeed, Fulcrum consistently has taken the position that the contents of its syngas – combusted in the boiler, a flare, and leaked through numerous connections – is proprietary and confidential. Even IDEM does not know what is in the syngas, much less the Petitioners.

obligation," or a "legal interest which will be enlarged or diminished" as a result. *Id.* (quoting *McFarland v. Pierce*, 45 N.E. 706, 706-07 (Ind. 1897)). This is not a heavy burden for a petitioner challenging IDEM's issuance of a Clean Air Act permit. *See*, *e.g.*, *Objection to the Issuance of NSR/PSF/Part 70 Operating Permit to Auburn Nuggett, LLC*, 2005 OEA 47 at 53 (finding administrative standing where petitioner lived sixteen miles from the facility and "asserts that he drives by the area approximately two times per month" and "spends a good deal of time performing outdoor activities in [the] County.").

Here, the Court has already found that two of the Petitioners are aggrieved or adversely affected and qualified to bring this petition based on their affidavits. *See* Order of December 21, 2022. The other Petitioners have provided similar sworn declarations providing evidence of their proximity to the proposed Fulcrum site and their concerns about additional sources of air pollution in Gary. *See* Fulcrum Motion, Exhibits 27-32. As such, Petitioners' standing is no longer reasonably at issue in this case.

Fulcrum argues that *Huffman*, 811 N.E.2d at 814-15, "stands for the proposition that parties must be allowed to develop evidence regarding whether a petitioner was aggrieved or adversely affected by administrative action." Fulcrum Motion, at 15. Fulcrum is wrong. *Huffman* has nothing to do with discovery or its proper scope. Rather, the Indiana Supreme Court in *Huffman* reversed the Office of Environmental Adjudication's dismissal of a petition for review on grounds that the petitioner lacked standing, concluding that the OEA's dismissal was not supported by substantial evidence. In reaching its decision, the Supreme Court reasoned that the parties should have been given an opportunity "to provide additional evidence or to develop the

arguments more fully, such as through a hearing." *Id.*, at 814.[5] Fulcrum cites no cases in which a court permitted unlimited, sweeping discovery into a petitioner's private life in hopes of digging up some proverbial "dirt" to defeat the petitioner's allegations of standing.

2. *The Law of Proportionality in Discovery*

Each Petitioner asserted the following general objection for each of the three types of discovery Fulcrum propounded:

> the burden or expense of the proposed discovery outweighs any likely benefit and the purpose of the requests appears aimed at harassing, intimidating, or otherwise frustrating Petitioner's ability to exercise her right, guaranteed by Indiana state law, to pursue an administrative appeal of a government issued permit to build and operate a potential, major source of criteria air pollution in Gary.

See, *e.g.*, Fulcrum Motion, Exhibit 5 (Natalie Ammons's Objections and Responses to Fulcrum Centerpoint, LLC's First Set of Requests for Production of Documents). Fulcrum's motion to compel acknowledges this objection, *see* Fulcrum Motion, at 1, 10, but never addresses it.

This Court has the authority to limit the frequency or extent of discovery otherwise permitted if the burden or expense of the proposed discovery outweighs its likely benefit. Tr. R. 26(B)(1). In determining whether the burden or expense of the proposed discovery is outweighed by its benefits, the Court must consider five factors: (1) the needs of the case, (2) the amount in controversy, (3) the parties' resources, (4) the importance of the issues at stake in the litigation, and (5) the importance of the proposed discovery in resolving the issues. *Id.*

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[5] Fulcrum's citation to *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 2 F.4th 1002, 1010 (7th Cir. 2021), is similarly misplaced. There, the Court upheld the dismissal of an organization's Clean Water Act citizens suit because the complaint lacked allegations to support associational standing. At most, *Prairie Rivers* stands for the proposition that it is plaintiff's burden to adequately allege standing in the complaint and to establish facts to support standing on summary judgment and at trial. The case makes no mention of defendant's need for discovery regarding plaintiff's standing.

To illustrate, in *Perry v. Best Lock Corp.*, 98C0936, 1999 WL 33494858 (S.D. Ind. Jan. 21, 1999), an employment discrimination case, defendant subpoenaed 19 businesses, including the plaintiff's current and former employers. The court granted plaintiff's motion to quash the subpoenas under the similar language of Fed. R. Civ. P. Rule 26(b)(1), concluding that the cost and burden on plaintiff outweighed any potential benefit in resolving the issues in the case. *Id.* Of particular relevance to the instant matter, the court explained its rationale:

> the apparent disparity in resources and the defendant's ability to inflict additional costs on Perry as she pursues this case are relevant in determining whether to permit discovery that appears to have no more than marginal and attenuated relevance. The potential burdens of the proposed discovery are also substantial in terms of broadcasting to a large group of businesses that Best Lock views Perry as an untrustworthy troublemaker. Best Lock is entitled to its view. It is also entitled to obtain information through informal and voluntary channels. It is not entitled in this case to use the compulsory process of the United States courts to pursue the information it hopes exists.

Id., at *3. There is no reason for a different outcome here.

The five proportionality factors overwhelmingly weigh against Fulcrum's motion to compel. As discussed above, there is no longer any need to prove administrative standing. There is no amount in controversy warranting such extensive discovery. Petitioners are private citizens with limited resources. And the proposed discovery has nothing to do with the serious issues presented in this case. Responding to Fulcrum's irrelevant and voluminous discovery requests has already been significantly burdensome. Considering the five factors set forth in Tr. R. 26(B)(1), the Court should deny Fulcrum's motion because the burden on Petitioners of providing further responses far outweighs any likely benefit.

2. An Examination of Fulcrum's Discovery Demands Demonstrates Why its Motion to Compel Should be Denied as Irrelevant and Not Proportional to its Needs

Petitioners have fully and adequately responded to Fulcrum's 607 discovery requests and provided detailed objections explaining why the disputed requests are plainly out-of-bounds. As

such, Petitioners have satisfied their discovery obligation and Fulcrum's motion to compel should be denied. In support of its motion, Fulcrum groups its discovery requests in three broad categories, summarizes and mischaracterizes Petitioners' responses and objections, and cites inapposite caselaw, often with misleading parentheticals. Here are a few examples that demonstrate how Fulcrum's discovery is irrelevant and not proportional to any potential need:

(a) *Discovery of Petitioners' Communications Related to Fulcrum*

Fulcrum wants each Petitioner to supplement his or her response to the following two Requests for Production:

> **RFP 1. All communications relating to Fulcrum, Fulcrum's employees and representatives, the permit at issue, litigation against Fulcrum, and/or the pending petition for administrative review except for communications between Petitioners and their current attorneys of record in this matter.**

> **RFP 4. All communications and documents identified in your answers to Fulcrum's interrogatories.**

Fulcrum also seeks to compel each Petitioner to provide further answers to Interrogatories 6, 8, and 12 through 15:

> **INTERROGATORY NO. 6: Identify any document(s) relating to Fulcrum, Fulcrum's employees and representatives, the permit at issue, litigation against Fulcrum, and/or the pending petition for administrative review that any petitioner has destroyed, including the name of the person who destroyed the document and the date of destruction**.
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> **INTERROGATORY NO. 8: State the following information with respect to each person from whom a statement of any kind concerning the subject matter of this litigation has been taken by you or anyone acting on your behalf:**
>
> **(a) The name, address, title, and employer of the person who made the statement;**
> **(b) The date each statement was taken;**
> **(c) The nature of the statement, i.e. written, oral, typed, recorded, etc.**
> (d) **The name, address, title, and employer of each person who took each statement and the person having custody thereof.**

INTERROGATORY NO. 12: Identify all attorneys that you contacted relating to this matter, including, but not limited to those who you contacted in an attempt to gain representation in this matter.

INTERROGATORY NO. 13: Other than communications with your current counsel of record, Kim Ferraro and Mike Zoeller, identify all communications you have had with attorneys relating to this matter.

INTERROGATORY NO. 14: Identify all communications you have had with the media relating to this matter.

INTERROGATORY NO. 15: Identify all communications you have had with elected representatives or government officials, including local, state, and federal, relating to this matter.

Petitioners objected to these requests and interrogatories as overbroad and burdensome in that they would sweep in an untold amount of their personal communications that have nothing to do with the material issues in the case. But objections aside, Petitioners did not refuse to produce responsive documents. Instead, they produced documents with relevance to the issuance of the FESOP: communications Petitioners had with individuals at IDEM and U.S. EPA who were involved with the permitting. Each of the Petitioners searched their personal computer for documents and emails and any other personal files for similar communications and produced all that they found.

Fulcrum claims that this is not enough because "Petitioners may have discussed this litigation, made admissions against interest, or characterized this matter in a way that contradicts their pleadings." Fulcrum Motion, at 6. In short, Fulcrum is digging for dirt on the Petitioners. That is not the purpose of discovery. Such an open-ended search for "admissions against interests" could make discovery in every case a free-for-all.

Fulcrum supports its outlandish argument by claiming that "Courts regularly conclude that communications and statements relating to a lawsuit are relevant and order them to be produced." Fulcrum Motion, at 6. But the seven cases Fulcrum cites in support of this broad

proposition – notably buried in footnote 3 of its motion – are wholly inapposite to the situation here. And not one of these cases supports compelling a party to produce any and all communications where the litigation is tangentially mentioned in some way. Rather, these decisions confirm that certain communications that are *materially* relevant to the claims or defenses in those proceedings were discoverable, not that all communications are categorically discoverable in all circumstances.[6]

Citation	Fulcrum's parenthetical	Court's holding
Yeary v. State, 186 N.E.3d 662, 683 (Ind. Ct. App. 2022)	("the text messages . . . are relevant")	In reversing conviction for drug-induced homicide for instructional error, Court found that trial court had also erred in excluding certain text messages sent and received by the victim in the days preceding his death that could be relevant to an element of the offense.
Schnitzmeyer v. State, 168 N.E.3d 1041, 1045 (Ind. Ct. App. 2021)	("the contested text messages were relevant")	In affirming conviction for dealing in methamphetamine, the Court upheld the trial court's admission of text messages between defendant and the victim of a recent shooting "based on their tendency to demonstrate a particular drug trading scheme" and a relationship between the two" that that was not substantially outweighed by any risk of unfair prejudicial effect under Ind. Evid. R. 403.
Carmichael v. Separators, Inc., 148 N.E.3d 1048, 1062-1063 (Ind. Ct. App. 2020)	(concluding defendants "destroyed and concealed data relevant to Separators' claims," including emails, and affirming entry of default judgment as sanction)	Affirming the trial court's award of default judgment against defendants for misappropriation of trade secrets as sanction for destroying 1000 computer files that "demonstrated a flagrant disregard for the trial court's discovery orders and the judicial process."

[6] A fact is not material "unless it may affect the outcome of the suit under governing law." *Hill v. St. Louis Univ.*, 123 F.3d 1114, 1118-1119 (8th Cir. 1997) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

Turner v. Boy Scouts of America, 856 N.E.2d 106, 113 (Ind. Ct. App. 2006)	(reversing trial court and concluding that "the sources and content of the letters are relevant," and ordering the letters to be produced)	In defamation case alleging that communications about plaintiff's alleged involvement with child pornography were false and defamatory, trial court abused its discretion in denying plaintiff's motion to compel the production of five letters about plaintiff's alleged possession of child pornography that was relevant to whether defendant made communications to others without belief or grounds for belief in their truth and/or with ill will.
Hyundai Motor Co. v. Stamper, 651 N.E.2d 803, 808 (Ind. Ct. App. 1995)	(concluding information sought was discoverable because "there is a possibility that the statements are relevant to issues of safety and crashworthiness.")	In personal injury case alleging product defect, appellate court affirmed trial court's order to compel defendant auto manufacturer's president to answer requests for admission that statements attributed to him in a publication were accurately quoted and admissible as an admission of a party.
Advanced Magnesium Alloys Corp. v. Dery, 2022 WL 3139391 at *5 (S.D. Ind. Aug. 5, 2022)	(granting motion to compel and ordering production of text messages)	In a case involving misappropriation of trade secrets, the court ordered defendants to produce "all text messages between" the CEO and the president of one of the defendants "during the month of July 2019" when a meeting at the center of plaintiff's allegations occurred.
Granite State Ins. Co. v. Pulliam Enter., Inc., 2015 WL 13668335 at *2 (N.D. Ind. Nov. 23, 2015)	("the Court is convinced that the reinsurance information and communications are relevant to this case and must be produced.")	In insurance coverage dispute, court held that insurers' reinsurance policies and communications with reinsurers were relevant and must be produced under Fed. R. Civ. P. 26(a)(1)(A)(iv) that is similar to Ind. Tr. R. 26(B)(2).

Here, there is nothing Petitioners could have said to the media, their employers, their spouses, or anyone else that would have any material relevance—i.e., would tend to prove or disprove—that IDEM complied with applicable regulations in issuing the FESOP or that Petitioners have administrative standing.

(b) *Discovery of Gary Advocates for Responsible Development*

In Interrogatories 2, 3, and 11, Fulcrum seeks the identity of all current and former members of GARD and anyone who has donated money to GARD on the grounds that such discovery is needed to establish GARD's associational standing. Several of the individual Petitioners are members of GARD. According to Fulcrum, however, "there is no proper basis for Petitioners to limit the identity of GARD members to a few select members." Fulcrum Motion, at 21. In Fulcrum's view, each member of an organization is subject to discovery of information relating to the organization's purpose and the veracity of any allegations made in the Amended Petition. *Id.* That is not the law. A non-profit organization like GARD may represent people it identifies as its "members" based on their voluntary decision to join and support the organization's mission. When the organization has identified members that it represents in good faith, no "further scrutiny into how the organization operates" is required. *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College,* 143 S.Ct. 2141, 2158 (2023).

The leading case in Indiana on administrative standing for an organization, *Save The Valley, Inc. v. Indiana-Kentucky Elec. Corp.*, 820 N.E.2d 677 (Ind. Ct. App. 2005), explains why associational standing is important.

> First, allowing an association to represent its members' interests promotes judicial economy and efficiency. The *Hunt* requirements allow a single plaintiff, in a single lawsuit, to adequately represent the interests of many members, avoiding repetitive and costly independent actions. Associational standing also allows members, who would have standing in their own right, to pool their financial resources and legal expertise to help ensure complete and vigorous litigation of the issues. A third reason for allowing associational standing was recognized by the Georgia Supreme Court when it observed that associations are generally less susceptible than individuals to retaliations by officials responsible for executing the challenged polices.

Save the Valley, 820 N.E.2d at 680-81 (citations omitted). These reasons are each served in this matter, and GARD has provided more than sufficient evidence to establish its associational

standing without having to disclose the identity of all of its members to find out if they agree with GARD's mission and purpose.

Specifically, to establish associational standing, an organization must show that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.*, at 679-680 (quoting *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 344 (1977)). Mirroring the allegations here, the Indiana Court of Appeals found standing in *Save the Valley* because:

> The petition alleged that members of the groups reside, work, and recreate in the area affected by the landfill and that the individual members would be adversely affected by the impact on the groundwater and by fugitive dust from the landfill. Second, because the Appellants aim to protect the environment and advance members' interests on energy and utility issues, the interests they seek to protect are germane to the organizations' purposes. Third, the Appellants only sought review of the granting of a permit and not an award of monetary damages, which would have required individualized proof. Thus, the three requirements of the Hunt test are satisfied.

Save the Valley, 820 N.E.2d at 682 (citation omitted).

Here, one of GARD's members has already established standing in her own right and the others, including GARD, have submitted sworn declarations. The interests GARD seeks to protect in this case – i.e., limiting another source of harmful air pollution in Gary without verifiable emissions calculations – are germane to the organization's purpose, which is to "promot[e] economic development in the city of Gary, Indiana, that prioritizes environmental sustainability." *See* Exhibit 1 (GARD Articles of Incorporation). And like *Save the Valley*, because GARD only seeks review of a FESOP, there is no need for the participation of individual members. Nonetheless, individual members joined this matter to ask IDEM to review

its decision to approve a synthetic minor source operating permit for Fulcrum's proposed biorefinery in Gary. This is more than sufficient evidence to demonstrate GARD's associational standing and further discovery of GARD is unwarranted.

(c) *Discovery of Petitioners' Social Media Accounts*

In a similar fishing expedition, Fulcrum asks for information needed to search Petitioners' social media accounts:

> **INTERROGATORY NO. 10: Do you have any social media accounts, including, but not limited to, Facebook, Twitter, Instagram, or LinkedIn? If yes, please state your username for each of your social media accounts**.

In doing so, Fulcrum argues that "Indiana courts regularly conclude that information about parties to a lawsuit, including social media account information, is discoverable," citing in footnote 4 of its Motion three cases with parentheticals that mischaracterize their application to the facts here.

Fulcrum first cites *Singh v. State*, 203 N.E.3d 1116, 1122-23 (Ind. Ct. App. 2023) as "finding Snapchat evidence relevant." The Court of Appeals in *Singh* found that the appellee convicted of reckless homicide for his involvement in an automobile accident should have been able to discover the Snapchat activity of the deceased driver of the other vehicle at the time of the accident. *Id.*, at 1122-1123. In other words, the Snapchat activity in *Singh* was directly related to a fundamental factual issue at stake in that criminal case. That is in no way comparable to what Fulcrum seeks to do here; which is to intrusively search all of Petitioners' social media accounts for something that might contradict some unspecified allegation in their Amended Petition. The Court should admonish Fulcrum for making the request.

Similarly, Fulcrum asserts that the District Court in *Higgins v. Koch Development Corp.*, 2013 WL 3366278 at *2 (S.D. Ind. July 5, 2013) found "Facebook content relevant and granting motion to compel same." But *Higgins* involved a personal injury lawsuit where the court

determined that plaintiffs' Facebook pages had information relevant to the plaintiffs' injuries allegedly sustained at defendant's amusement park and specifically their "lung and respiratory injuries and their employment activities, outdoor activities, and enjoyment of life reasonably related to those injuries and their effects." 2013 WL 3366278 at *2 (S.D. Ind. July 5, 2013). Here, Petitioners have not alleged personal injury. Rather, they filed this administrative appeal to prevent any such injuries. Thus, the reason for allowing discovery of Facebook pages in *Higgins* has no application here.

Finally, without any context, Fulcrum quotes a single sentence from *Doe v. Purdue University*, 2021 WL 2767405 at *9 (N.D. Ind. July 2, 2021) in support of discovery of Petitioners' social media accounts: "While the Court will certainly not speculate as to the possible content of the deleted Snapchat files, it is entirely conceivable that they could be relevant to these claims." *Doe* is a civil rights case seeking injunctive relief arising out of an investigation of a claim of sexual harassment from 2015. Despite being told – and having agreed – to preserve Snapchat files from 2015, Plaintiff deleted them. As such, the court sanctioned plaintiff for destroying potential evidence probative of one of the most significant issues in the case – whether plaintiff had indeed engaged in sexual harassment. The underlying facts of *Doe*, its procedural history, and the court's rationale have nothing in common with the instant petition for administrative review or Fulcrum's unlimited discovery. To suggest otherwise is misleading.

Fulcrum cites no cases in which private citizens' personal social media accounts were found discoverable in order to challenge whether they are aggrieved or adversely affected by an IDEM permit. The cases cited by Fulcrum do not support doing so here, nor are they as broad-reaching or unlimited in time or scope as Fulcrum contends. Like Fulcrum's other discovery requests, the intrusiveness into Petitioners' social media accounts outweighs any potential

probative value and would only serve to intimidate and discourage these Petitioners and others from exercising their right to administrative review of an agency decision.

(d) *Argumentative Requests for Admission and Contention Interrogatories*

Fulcrum seeks to have each Petitioner supplement their response to the following three Requests for Admission that are similar to Interrogatories 16 and 17.

(1) Admit that abandoned buildings in Gary are a blight on the community.

(5) Admit that multi-million dollar investments into Gary benefit Gary.

(6) Admit that multi-million dollar investments into Gary benefit the citizens of Gary.

Fulcrum argues that these admissions are relevant to Petitioners' claims that they have been aggrieved or adversely affected by the FESOP. That FESOP, however, is for the construction and operation of a facility with the uncontrolled potential to emit more than 1,400 tons of volatile organic compounds, 1,175 tons of fine particulates, and 170 tons of nitrogen oxides per year. *See* PTE Summary Table. Whether or not there are abandoned buildings or investments in Gary has no bearing on whether the FESOP issued to Fulcrum complies with the law.

In essence, Fulcrum is arguing that Petitioners cannot be "aggrieved or adversely affected" by the tons of pollutants allowed by IDEM under the FESOP because the project will purportedly benefit Gary in other ways. But that is not the legal standard. Petitioners' opinions on blight and what sort of investments they think will benefit Gary have nothing to do with Petitioners' aggrieved status and ability to bring this administrative appeal. As such, these requests to admit, like Fulcrum's other out-of-bound requests, are condescending and serve no purpose other than to intimidate and oppress Petitioners.

Fulcrum also seeks additional responses to contention interrogatories 23-37, that asks each Petitioner to "[i]dentify each and every basis for the allegation(s) in" paragraphs 39, 48,

58-60, 62, 63, 65, 73-76, 78, and 79 of the Amended Petition for Administrative Review. Petitioners' counsel fully responded to each of Fulcrum's 15 contention interrogatories, providing Fulcrum with all the information relied on in drafting those paragraphs of the Amended Petition and including references to the record. Fulcrum does not dispute that Petitioners' counsel fully answered these interrogatories nor does Fulcrum challenge any of the substantive responses. Instead, Fulcrum argues that it is entitled to receive responses to these contention interrogatories from each Petitioner and not their counsel, citing *Castillo v. Ruggiero*, 562 N.E.2d 446, 451-453 (Ind. Ct. App. 1990). Like the other cases Fulcrum cites, *Castillo* has no application here.

Castillo involved a medical malpractice lawsuit in which defendants sought discovery into plaintiff's allegations of the defendant doctors' negligent conduct. In response, the plaintiff referred to the allegations of the complaint and the court found that this "vague, general response" was incomplete. *Castillo* says nothing about whether interrogatories must be answered by the party and not its counsel when, as here, the information provided is not within the party's personal knowledge but is known by the party's counsel.

Fulcrum's 15 contention interrogatories all concern the allegations of an Amended Petition drafted by counsel. The individual Petitioners cannot be expected to "[i]dentify each and every basis for the allegation(s) in" any of the specified paragraphs. If Fulcrum is actually interested in discovering the bases for Petitioners' allegations, substantive responses from the attorney who drafted those allegations are the most responsive. Nothing more is required of Petitioners.

III. CONCLUSION

Fulcrum's abuse of the discovery process has gone on long enough. Petitioners have provided specific objections with the basis for each, along with detailed, substantive responses to any requests that were arguably relevant. Seeking the Court's intervention to demand more of Petitioners after failing to make a reasonable effort to resolve the dispute is further abuse of the discovery process – particularly in an administrative proceeding in which Fulcrum has access to and control of all of the evidence it needs concerning the issues at stake. Fulcrum's effort to create a discovery dispute in an attempt to avoid any substantive review of its FESOP should be rejected by this Court and Fulcrum's motion to compel should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document and all attachments referenced therein were served upon the following individuals via electronic mail, an accepted form of service in this case, on this 10th day of August, 2023:

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