

**Objection to the Approval of Solid Waste Facility Renewal  
Clifty Creek Station, Restricted Waste Site Type III, FP #39-4  
Jefferson County, Indiana  
2010 OEA 21, (02-S-J-2989)**

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**OFFICIAL SHORT CITATION NAME:** When referring to 2010 OEA 21, cite this case as  
*Clifty Creek Station, 2010 OEA 21.*

**TOPICS:**

summary judgment  
fly ash  
public water supply wells  
expert  
law of the case  
point source discharge  
seepage  
fugitive dust  
ground water  
Lujan  
Harm

**PRESIDING JUDGE:**

Catherine Gibbs

**PARTY REPRESENTATIVES:**

IDEM: Denise A. Walker, Esq.  
Petitioner: Jerome Polk, Esq.; Polk & Associates, LLC  
Permittee: Anthony C. Sullivan, Esq., Guinn P. Doyle, Esq., David Heger, Esq.;  
Barnes & Thornburg, LLP

**ORDER ISSUED:**

March 17, 2010

**INDEX CATEGORY:**

Land

**FURTHER CASE ACTIVITY:**

Judicial Review

*IKEC v. IDEM, et. al*, 49D07-1004-MI-016855 (Marion Sup. Ct. 2010) Denied & Dismissed.

*IKEC v. Save the Valley et. al*, 49A02-1011-MI-1178 ( Ind. App. Ct. 2011) Affirmed Trial Court.

*IKEC v. Save the Valley et. al*, 49S02-1202-MI-72 (Ind. Sup. Ct. 2012) Affirmed Court of Appeals  
& Denied Transfer.



**Objection to the Approval of Solid Waste Facility Renewal  
Clifty Creek Station, Restricted Waste Site Type III, FP #39-4  
Jefferson County, Indiana  
2010 OEA 21, (02-S-J-2989)**

5. On March 3, 2003, IKEC filed a second Motion to Dismiss and brief in support alleging the Initial Petition did not meet statutory requirements to invoke the jurisdiction of the OEA because an organization's allegation of its members' injury, as opposed to its own, is insufficient to confer standing under controlling decisions of the Indiana Courts.
6. On June 23, 2003, the OEA issued its Findings of Fact, Conclusions of Law, and Order Denying Motions to Dismiss ("OEA Order"). In that order, the OEA denied IKEC's February 7, 2003 Motion to Dismiss, concluding that despite Citizens Groups' failure to meet the requirements in I.C. § 13-15-6-2 with their Initial Petition, Citizens Groups established subject matter jurisdiction in their initial pleading and their Amended Petition met the requirements of I.C. § 13-15-6-2. The OEA also denied IKEC's March 3, 2003 Motion to Dismiss, concluding that Citizens Groups had alleged facts in their Amended Petition sufficient to confer associational standing to obtain administrative review of the permit renewal under I.C. § 4-21.5-3, the Administrative Orders and Procedures Act ("AOPA").
7. On July 3, 2003, IKEC sought judicial review of the determination in the OEA Order with respect to its March 3, 2003 Motion to Dismiss.
8. On October 27, 2003, the Marion Superior Court concluded that it had subject matter jurisdiction and granted IKEC a declaratory judgment that the OEA lacked jurisdiction over this particular case because Indiana did not recognize associational standing for purposes of satisfying the "aggrieved or adversely affected" standard for administrative review under AOPA.
9. However, on January 11, 2005, the Court of Appeals reversed the Marion Superior Court, deciding that Indiana recognized associational standing for purposes of satisfying the "aggrieved or adversely affected" standard for administrative review under AOPA and that the OEA had jurisdiction over the particular case, thus affirming the OEA Order of June 23, 2003. *See Save the Valley, Inc. v. Indiana-Kentucky Elec. Co.*, 820 N.E.2d 677 (Ind. Ct. App. 2005) (hereinafter, "*Save the Valley*").
10. On March 31, 2005, the Court of Appeals affirmed this decision on rehearing, *see* 824 N.E.2d 776 (Ind. Ct. App. 2005), and, on August 11, 2005, the Supreme Court denied transfer. The case was remanded to the OEA.
11. IKEC filed a Motion to Dismiss the Petition for Review and a Motion for Summary Judgment on October 14, 2005 on the grounds that Citizens Groups are without standing to secure review of IDEM's December 2002 renewal of IKEC's Permit because none of the named members of Citizens Groups have standing to challenge the Permit renewal in their own right. IKEC also moved for summary judgment on Citizens Groups' claim in their Amended Petition that IDEM abused its discretion in renewing the Permit without first providing notice and an opportunity for public comment and hearing.

**Objection to the Approval of Solid Waste Facility Renewal  
Clifty Creek Station, Restricted Waste Site Type III, FP #39-4  
Jefferson County, Indiana  
2010 OEA 21, (02-S-J-2989)**

12. IKEC filed a Motion to Reconsider OEA's Order of June 23, 2003 in Light of New Authority and to Dismiss the Petition for Review on November 4, 2005.
13. On March 24, 2006, the ELJ issued Findings of Fact, Conclusions of Law and Order Denying Motion to Reconsider and Motion to Dismiss, finding that *Save the Valley* was binding on this case.
14. On March 23, 2007, the ELJ issued Findings of Fact, Conclusions of Law and Order partially denying and partially granting IKEC's motion for summary judgment. The ELJ found that the Citizens Groups were aggrieved and adversely affected by the issuance of the Permit. The ELJ further found that a genuine issue of fact existed as to whether ash waste constituents from the Landfill could potentially impact ground water or surface water. Summary judgment was granted in favor of IKEC on the Citizens Groups' allegations about fugitive dust. Further, the Court granted summary judgment in IKEC's favor regarding the Citizen Groups' allegations that IDEM had erred in failing to provide a public hearing before issuance of the Permit.
15. IKEC filed another Motion for Summary Judgment on November 2, 2007. The Court denied this motion on March 26, 2008 finding that, while IKEC was in compliance with its permit, that the IDEM had the authority to modify the permit at the time of its renewal.
16. IKEC then filed a Motion for Partial Summary Judgment on Surface Water Issues on May 7, 2007. On October 6, 2008, the Court granted the motion for summary judgment finding that no issue of material fact existed regarding the Citizens Groups' allegations about the contamination of surface water. This included determinations that NPDES-permitted discharges and minor seepage from the Landfill are lawful and non-injurious.
17. IKEC filed Indiana Kentucky Electric Corporation's Motion for Partial Summary Judgment on All Issues Relating to Water Supplied by the City of Madison Water Department on August 31, 2007.
18. On November 8, 2007, IKEC filed a Motion for Partial Summary Judgment on Kent Water Company Issues. On March 6, 2009, the Court denied IKEC's motion on the grounds that the Citizens Groups had presented sufficient evidence to create an issue of fact as to whether Kent Water Company well fields may be affected by contamination migrating from the Landfill.
19. On September 26, 2006, IKEC filed Indiana-Kentucky Electric Corporation's Motion to Reconsider This Court's Order of March 24, 2006 In Light of New Authority and to Correct Oversights. On April 22, 2008, IKEC filed Indiana-Kentucky Electric Corporation's Motion to Reconsider this Court's Order of March 26, 2008. On August 28, 2008, the Court denied the Motions for Reconsideration.

**Objection to the Approval of Solid Waste Facility Renewal  
Clifty Creek Station, Restricted Waste Site Type III, FP #39-4  
Jefferson County, Indiana  
2010 OEA 21, (02-S-J-2989)**

20. On April 15, 2008, the IDEM renewed the Permit at issue in this case. The renewal included approval of major modifications of the Landfill.
21. On May 8, 2008, the Citizen Groups filed their Petition for Review. This cause was assigned Cause Number 08-S-J-4106.
22. On February 19, 2009, the IDEM filed its Motion to Dismiss as Moot or Consolidate. The Court denied the motion to dismiss, but granted the motion to consolidate this cause with Cause No. 08-S-J-4106 on June 5, 2009.
23. On August 24, 2009, the Court granted IKEC's Motion for Partial Summary Judgment on All Issues Relating to Water Supplied by the City of Madison Water Department.
24. On May 6, 2009, IKEC filed this Motion for Summary Judgment on All Remaining Issues (Which Relate to Possible Future Contamination of Drinking Water Supplied by Kent Water Company and City of Madison Water Department). On June 8, 2009, IKEC filed its Filing of Supplemental Affidavits in Support of Its Motion for Summary Judgment and Supplemental Designation of Evidence.
25. The Response of Save the Valley, Hoosier Environmental Council and Citizens Action Coalition of Indiana in Opposition to Indiana-Kentucky Electric Corporation's Motion for Summary Judgment on All Remaining Issues; Citizens Groups Statement of Material Facts in Genuine Dispute; and Designation of Evidentiary Material Relied Upon were filed on June 8, 2009.
26. Indiana-Kentucky Electric Corporation's Response to Citizens Groups' Statement of Material Facts in Genuine Dispute; Indiana-Kentucky Electric Corporation's Second Supplemental Designation of Evidence; and Reply Brief in Support of Indiana-Kentucky Electric Corporation's Motion for Summary Judgment on All Remaining Issues (Which Relate to Possible Future Contamination of Drinking Water Supplied by Kent Water Company and City of Madison Water Department) were filed on June 19, 2009.
27. IKEC filed its Citation of Additional Authority on July 23, 2009.

**Order Separating Consolidated Cases**

1. On June 5, 2009, the Court granted the IDEM's Motion to Consolidate this cause with Cause No. 09-S-J-4106.
2. The Motion in question in this Order<sup>1</sup> was filed on May 6, 2009. The response was filed June 8, 2009. The reply was then filed on June 19, 2009.

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<sup>1</sup> Motion for Summary Judgment on All Remaining Issues (Which Relate to Possible Future Contamination of Drinking Water Supplied by Kent Water Company and City of Madison Water Department)

**Objection to the Approval of Solid Waste Facility Renewal  
Clifty Creek Station, Restricted Waste Site Type III, FP #39-4  
Jefferson County, Indiana  
2010 OEA 21, (02-S-J-2989)**

3. Neither the response nor reply addressed the 2008 permit renewal or any differences in facts or law that this renewal raised.
4. Further, IKEC filed a separate Motion for Summary Judgment on May 19, 2009 and a Motion to Dismiss on November 19, 2009 in Cause No. 08-S-J-4106.
5. The Court, *sua sponte*, determines that the causes should be separated and so **ORDERS**.

**FINDINGS OF FACT**

1. Clifty Creek Station is a six-boiler, 1304-megawatt coal-fired electric generating station located at the edge of Madison in Jefferson County, Indiana. It began operating in 1955, sluicing fly ash from coal combustion to an on-site disposal pond. The same approximately 200-acre ash disposal site was permitted as a Type III Restricted Waste facility for coal combustion byproducts in 1988 when IDEM issued construction and operating permits. Sluicing ceased in 1991, when the facility was converted to a dry fly ash landfill (the "Landfill") pursuant to the 1988 permit.
2. On December 11, 2002, Respondent Commissioner of the Indiana Department of Environmental Management ("IDEM") issued an order renewing Permit No. FP 39-4 (the "Permit"), which authorizes IKEC to operate the ash disposal landfill at its Clifty Creek Station in Jefferson County, Indiana (the "Landfill").
3. On December 26, 2002, Citizens Action Coalition of Indiana, Inc. (CAC); Hoosier Environmental Council, Inc. (HEC); Save the Valley, Inc. (STV) ("Citizens Groups") filed their Petition for Review, which was amended on March 31, 2003, by leave of OEA.
4. The Amended Petition identified the following as persons aggrieved by the Permit: Henry and Marie VanLeeuwen were members of STV and CAC (Mrs. VanLeeuwen died in 2008); J. Dan Webster was a member of STV and HEC; Juanita Webster was a member of STV; Ralph Seifert was a member of CAC; Marc Gray was a member of STV. The Amended Petition names two other members, Marjorie Modisett and Candace Gray. However, Petitioners withdrew representation of Dr. Modisett (IKEC Exh. 22) and Mrs. Gray (IKEC Exh. 23) in October 2003. Mr. VanLeeuwen, the Websters, and Messrs. Seifert and Gray are herein referred to as the "Members."
5. Citizens Groups have alleged that the Landfill is the source of groundwater contamination, which threatens the Members' water supply.

**Objection to the Approval of Solid Waste Facility Renewal  
Clifty Creek Station, Restricted Waste Site Type III, FP #39-4  
Jefferson County, Indiana  
2010 OEA 21, (02-S-J-2989)**

6. Except for Mr. Gray, all Members are residents of the Town of Hanover, which is served by Kent Water Company (the “KWC”), and all use water supplied by the KWC for drinking and domestic purposes. *Members’ Depositions, IKEC Exhs. 11, 13, 15, 16, 18.* Mr. Gray does not live in Madison or Hanover. Mr. Gray neither drinks nor uses for domestic purposes any water supplied by either KWC or Madison; he drinks only bottled water. *Exh. 18, at pp. 18, 26, & 33. Groups’ Designation of Evidence cites Pet. Exhs. 26, 27, and 28, Verified Statements of Trudy Mitchell, Carole Gallatin, and Richard Hill, all of whom state that they are members of one of the Citizens Groups and that they use water supplied by the City of Madison. The Designated Evidence contains no indication that these individuals are harmed or aggrieved, and they are not mentioned in the Amended Petition.*
7. KWC obtains its water supply from two (2) well fields: the former Hanover College Well Field and the Kent Well Field. The supply wells are completed in alluvial deposits along the Ohio River. The alluvial deposits are part of the Atherton Formation aquifer recharged in part from the Ohio River, and the two wells are about 0.6 miles, and 1.1 miles, respectively, downstream of the Landfill near the Ohio River.
8. The United States Geological Survey website gives an Ohio River current velocity of 1 to 6 feet per second. At that speed, ash constituents entering the Ohio River from the Landfill reach the area of the farther KWC well field in less than two hours and have done so for 55 years without any recorded adverse effects. The Ohio River’s mean-flow of 52 million gallons per minute (“MGPM”) (and 4.8 MGPM 7-consecutive-day lowest flow in 10 years) quickly dilutes any ash constituent contribution from the Landfill to undetectable levels. *See Final Order of October 6, 2008, at Findings 5-8; Conclusions 6-17; IKEC Exhs. 32 & 34, supra.*
9. The City of Madison’s wells are drilled in alluvial deposits upstream on the Ohio River from Clifty Creek Station. AGES 2006.
10. These facts leave underground pathways between the Landfill and the respective KWC and Madison well fields as the only routes by which the Landfill could contaminate the public water supply wells. No such pathway is described in the Designated Evidence. Mr. King’s *Affidavit at Exh. 34* attests to the truth and accuracy of AGES 2006 (IKEC Exh. 32) to his personal knowledge. As indicated above, between 1955 and 1991 ash was sluiced into the area, creating an unregulated ash pond of 150 acres or so, AGES 2006 § 2.1. The area was drained, except for the Landfill Collection and Treatment Pond, and dry land filling began in 1991. Land filling of low sulfur coal ash began in 1995 and has continued to date. *Id.* at § 4.1. A layer of sluiced ash averaging about 30 feet deep lies on the ground across the whole site. *Id.*

**Objection to the Approval of Solid Waste Facility Renewal  
Clifty Creek Station, Restricted Waste Site Type III, FP #39-4  
Jefferson County, Indiana  
2010 OEA 21, (02-S-J-2989)**

11. Starting at the top of the landfilled area (without regard to the engineered, vegetated landfill cap installed or to be installed when the fill reaches its permitted elevation), the sequence of layers is as follows:
  - Low sulfur coal ash layers with cement-like characteristics and hydraulic conductivity of  $10^{-7}$  cm/sec. *Id.*, § 4.1.
  - Eight feet of boiler slag that isolates the overlying low sulfur coal ash from the groundwater table. *Id.*
  - An average of 30 feet of previously sluiced fly ash with hydraulic conductivity of  $4.9 \times 10^{-4}$  to  $6.9 \times 10^{-3}$  cm/sec. *Id.*, § 4.1.
  - Twenty to 40 feet of gray clay with hydraulic conductivity of  $10^{-4}$  to  $10^{-3}$  cm/sec. *Id.*, § 4.1.
  - Limestone bedrock of the Dillsboro Formation with conductivity of  $10^{-7}$  to  $1.22 \times 10^{-5}$  cm/sec (similar to the conductivity of the low sulfur coal ash). *Id.*
12. Outside the Landfill, the high bedrock ridge of the Devil's Backbone borders the site on the southeast running between the Landfill and the Ohio River. AGES 2006, Figures 1, 2, 5 & 8. (AGES 2006 at p. 5 says the formation borders the "western" portion of the site. As shown in the Figures, that is a mistake.) Also outside the Landfill proper, a steep bedrock wall borders the western side of the site, extending more than 100 feet above the terrain and bedrock to the east. AGES 2006, § 7.2 & Figure 9; *King Affidavits at Exhs. 34 & 52*. This wall and the sloping bedrock below the Dam that checks the Landfill Collection and Treatment Pond controls groundwater flow in the southwest area of the site and directs it all to the Ohio River, precluding any flow through the ground toward the Hanover wells. *Id.* §§ 4.7.1, 7.2.1 – 7.2.4, *King Affidavits at Exhs. 34 & 52*.
13. At the southwest end of the site, between the Dam and the Devil's Backbone, on one hand, and the Ohio River on the other hand, bedrock slopes toward the river, *Exh. 32 at Figure 9*. Atop the bedrock is 15 to 100 feet of silty clay overlying silty sand and gravel (alluvial deposits). These deposits have hydraulic conductivity of  $1.1 \times 10^{-3}$  to  $1.6 \times 10^{-2}$  cm/sec, making them the most hydraulically conductive strata in the area. *Id.* at §§ 3.4.3, 4.1.
14. Thus, the bedrock topography, the slope of the bedrock from west to east and north to south toward the Ohio River channel, and the relative hydraulic conductivity of the various strata all act to channel groundwater in the area toward the Ohio River and preclude any groundwater movement along the north side of the river from Clifty Creek Station toward the KWC wells.



**Objection to the Approval of Solid Waste Facility Renewal  
Clifty Creek Station, Restricted Waste Site Type III, FP #39-4  
Jefferson County, Indiana  
2010 OEA 21, (02-S-J-2989)**

15. All of this is undisputed by any Designated Evidence, and so it must be deemed to be true. *Webb v. Jarvis*, 575 N.E.2d 992, 994 (Ind. 1991), *reh'g denied*; *Burke v. Capello*, 529 N.E.2d 439, 440 (Ind. 1998); *Ramon v. Glenroy Constr. Co., Inc.*, 609 N.E.2d 1123, 1132 (Ind. Ct. App. 1993), *trans. denied*. The Designated Evidence does not contain any evidence that the bedrock is absent from any location or from any depth where the above-cited evidence indicates that it is.
16. Absence of evidence cannot bring into doubt the veracity of evidence that is adduced. Mr. Norris' August 2006 Supplement to his Second Statement (supplementing Groups' Exh. 20) changed his earlier testimony (which was based on his failure to discern or mention the subsurface bedrock formation and the steep bedrock wall to the west) and admitted the presence of the wall (§ 10 next-to-last sentence) and acknowledged that all the water goes into or under the Ohio River's main channel.
17. The Final Order of October 6, 2008, herein assumed that all the groundwater seepage from the site (not just the 2.8 gpm of seepage from the southwest area, AGES 2006, § 7.2.3) went to the Ohio River (meaning none went upstream to the Madison wells) and concluded that such seepage does not impair the Indiana Water Quality Standards. *Order at Finding 7 & Conclusions 12 & 17-18*. The Water Quality Standards require that the river water meet suitability standards for public or industrial water supply at the point of withdrawal. 327 IAC § 2-1-3(a)(3).
18. It is undisputed that no Member has yet suffered any harm after 55 years of ash disposal at the site. Each of the Members served by KWC denied in deposition testimony that the Landfill has ever harmed him or her. *IKEC Exhs. 11 (pp. 14-15), 13 (pp. 8, 10, & 19); 15 (p. 7); 16 (pp. 10-11, 13)*. These Members range in age from 91 or 92 (Mr. Webster) to 66 or 67 (Mr. Seifert). *IKEC Exhs. 11 (p. 5), 13 (p. 4), and 15 (p. 5)*. Each has lived within a few houses in the same neighborhood and been served by KWC or its predecessor utility for between 39 or 40 years (Mr. Seifert, Dep. at Exh. 13, p. 4) and 60 or 61 years (Websters', Exh. 16, p. 4). *Henry VanLeeuwen Dep., Exh. 11, p. 5*.
19. Disposal under the Permit Renewal began in December 2002. It is undisputed that travel time for ash constituents from the area presently being landfilled with low sulfur coal ash to the southwest end of the site, where some constituents may escape through seepage, is about 64.5 years. *Third King Affidavit (IKEC Exh. 49)*.
20. The water supplied by both KWC and the City of Madison has met all applicable standards under Indiana and federal law continuously from at least 1993 through 2008. *IKEC Exhs. 8-9 (Affidavits of Al Lao, Chief of IDEM's Compliance Section, Drinking Water Branch, covering 1993-2005); IKEC Exhs. 53 & 55 (Affidavits of Stephen Kleopher, Superintendent of KWC, covering 2006-2008); IKEC Exh. 56 (Affidavit of Randy Eggenpiller, City of Madison Water Department, covering 2005-2008)*.

**Objection to the Approval of Solid Waste Facility Renewal  
Clifty Creek Station, Restricted Waste Site Type III, FP #39-4  
Jefferson County, Indiana  
2010 OEA 21, (02-S-J-2989)**

21. Citizens Groups admit that they cannot state any facts to substantiate the claim that the Landfill poses a risk of harm to any Member in the immediate future, that there is a “plume” of ash constituents, that it threatens harm to any Member, that it is contributed to by IKEC’s ash disposal under the Permit, or that there is any prospect of IKEC’s violating 327 IAC § 2-11-2 in the immediate future.
22. No Designated Evidence (as distinguished from briefs and statements of issues) says or otherwise shows that any public water supply well is endangered by any “plume” of contamination or that any such plume exists.
23. No Designated Evidence shows that any Citizens Group or any Member has been harmed by operation of the Clifty Creek Station Landfill or by IDEM’s issuance of the 2002 Permit renewal order. No Designated Evidence shows that any Citizens Group or any Member was on December 26, 2002, when the Petition was filed, in danger of suffering harm as a result of IKEC’s operation of the Clifty Creek Station Landfill or IDEM’s issuance of the Permit.

**CONCLUSIONS OF LAW**

1. The Office of Environmental Adjudication (“OEA”) has jurisdiction over the decisions of the Commissioner of the IDEM and the parties to the controversy pursuant to I.C. § 4-21.5-7-3.
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. This Court must apply a *de novo* standard of review to this proceeding when determining the facts at issue. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993). Findings of fact must be based exclusively on the evidence presented to the ELJ, and deference to the agency’s initial factual determination is not allowed. *Id.*; 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 previous findings.

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

4. The OEA may enter judgment for a party if it finds that “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits and testimony, if any, show that a genuine issue as to any material fact does not exist and that the moving party is entitled to judgment as a matter of law.” I.C. § 4-21.5-3-23. The moving party bears the burden of establishing that summary judgment is appropriate. All facts and inferences must be construed in favor of the non-movant. *Gibson v. Evansville Vanderburgh Building Commission, et al.*, 725 N.E.2d 949 (Ind. Ct. App. 2000).

**Objection to the Approval of Solid Waste Facility Renewal  
Clifty Creek Station, Restricted Waste Site Type III, FP #39-4  
Jefferson County, Indiana  
2010 OEA 21, (02-S-J-2989)**

5. The Petitioners allege that IDEM's review was deficient in that it failed to recognize and provide for the possibility of migration of other constituents in the fly ash other than those constituents that IKEC must test for.
6. Applicable statutes and rules prohibit IKEC from operating the Landfill in a way that would contaminate the public water supply wells so as to injure the Members. In particular, the rule of the Indiana Water Pollution Control Board at 327 IAC § 2-11-2 provides in pertinent part the following:

\* \* \*

- (e) No person shall cause the ground water in a drinking water supply well to have a contaminant concentration that creates one (1) or more of the following:
  - (1) An exceedance of the numeric criteria established for drinking water class ground water in Tables [section] 6(a)(1) and (6)(a)(2) of this rule.
  - (2) A level sufficient to be acutely or chronically toxic, carcinogenic, mutagenic, teratogenic, or otherwise injurious to human health based on best scientific information.
  - (3) An exceedance of one (1) or more of the following indicator levels:
    - (A) Chloride at two hundred fifty (250) milligrams per liter.
    - (B) Sulfate at two hundred fifty (250) milligrams per liter.
    - (C) Total dissolved solids at five hundred (500) milligrams per liter.
    - (D) Total coliform bacteria at nondetect.
  - (4) Renders the well unusable for normal domestic use.
- (f) No person shall cause the ground water in a nondrinking water supply well, including an industrial, commercial, or agricultural supply well, to have a contaminant concentration that, based on best scientific information renders the well unusable for its current use.
- (g) The criteria established in subsections (e) and (f) are immediately enforceable on the effective date of this rule under IC 13-30 to protect ground water quality in water supply wells.  
**327 IAC § 2-11-2(e)-(g).**

7. Any migration of ash constituents from the Landfill having the injurious effects predicted by Groups would violate 327 IAC § 2-11-2, and therefore I.C. § 13-30-2(1) and - (3).
8. Citizens Groups' claim of aggrievement—or claim that the Members would have standing to sue in their own right—thus amounts to the allegation that IKEC will in the indefinite future violate 327 IAC § 2-11-2. Such a claim is barred by a long line of OEA decisions exemplified by the following:

**Objection to the Approval of Solid Waste Facility Renewal  
Clifty Creek Station, Restricted Waste Site Type III, FP #39-4  
Jefferson County, Indiana  
2010 OEA 21, (02-S-J-2989)**

IDEM must presume that any person that receives a permit will comply with the applicable regulations. The OEA will not overturn an IDEM approval upon speculation that the regulated entity will not operate in accordance with the law. *In the Matter of: 327 Article 3 Construction Permit Application Plans and Specifications for Sidney Wastewater Treatment Plant and Sanitary Sewer System Permit Approval No. 16684*, 2004 IN. ENV. LEXIS 22 (Ind. Off. Env. Adjud., November 5, 2004).

*Great Lakes Transfer Station, SWFP*, 2006 OEA 24, at Conclusion 21. *Accord, Jennings Water, Inc. v. Office of Environmental Adjudication*, 909 N.E.2d 1020, 1026 (Ind. Ct. App. 2009), *trans. denied* Oct. 29, 2009, *affirming Talara-Lykins - CAFO*, 2007 OEA 114 (*see especially Findings 31-33 & Concls. 7-10 & 14-15*); *Willcut Landfill - Medora Sanitary Landfill*, 2008 OEA 11 (Concl. 16); *Swine Pro 1, LLC CFO Objection*, 2007 OEA 155 (Concls. 11 & 15); *Twin Lakes Regional Sewer District*, 2007 OEA 53 (Concls. 16-17); *DeGroot Dairy CFO*, 2006 OEA 1 (Concls. 10-11); *Sidney Wastewater Treatment Plant and Sanitary Sewer*, 2004 OEA 99 (Concl. 8); *Lafollette Station Towne Centre*, 2004 OEA 67 (03-W-J-3263) (Concl. 9); *Stephen Gettelfinger, Washington, IN*, 1998 WL 918589 (OEA, 1998); *Objection to the Issuance of Permit Approval No. AW-4429, William Smith, Rush County, Indiana*, Cause No. 97-S-J-1855.

9. **Law of the Case.** In addition, OEA's Final Order of October 6, 2008, in this case stated the following:

Conclusions of Law Relating to Point Source Discharges

\* \* \*

While the above stated reason is sufficient in itself to preclude review of the Citizens Groups' contentions that the point source discharges are a source of contamination to surface water, it is also true that the OEA will not overturn an IDEM approval upon speculation that the regulated entity will not operate in accordance with the law. *In the Matter of: 327 Article 3 Construction Permit Application Plans and Specifications for Sidney Wastewater Treatment Plant and Sanitary Sewer System Permit Approval No. 16684*, 2004 In. Env. Lexis 22 (Ind. Off. Env. Adjud., November 5, 2004). So, any allegations that surface water will be contaminated due to violations of either the NPDES permit or the Permit at issue in this cause cannot serve as the basis for a finding or conclusion that the Permit was issued illegally.

Therefore, to the extent that the Citizens Groups contend that the point source discharges contribute contamination to the Ohio River and that this contamination is the basis for their assertion that the Permit was issued illegally, there is no genuine issue as to any material fact and summary judgment on this issue is appropriate.

**Objection to the Approval of Solid Waste Facility Renewal  
Clifty Creek Station, Restricted Waste Site Type III, FP #39-4  
Jefferson County, Indiana  
2010 OEA 21, (02-S-J-2989)**

Conclusions of Law Relating to Seepage

\* \* \*

As noted above in Conclusion of Law paragraph #8, the OEA will not overturn a permit on allegations that the permittee will violate its permit. To the extent that the Citizens Groups' allege that the Permit was issued illegally because seepage from the Landfill would violate the WQS, the ELJ concludes that no genuine issue exists and summary judgment is appropriate.

**Similarly, OEA's Order of March 23, 2007, in this case states:**

Conclusions of Law Relating to Fugitive Dust

\* \* \*

Petitioners' allegations of impacts "likely" to occur are based solely upon speculation that IKEC may at some point in the future violate the law by generating fugitive dust beyond its property boundaries in excess of the amounts allowed by 326 IAC 6-4 and the terms of the Permit. Such allegations may constitute potential enforcement issues, but are not issues properly before OEA in this proceeding. OEA may not overturn an IDEM approval upon speculation that the regulated entity will not operate in accordance with the law. *In the Matter of: Objection to the Issuance of Approval No. AW 5404, Mr. Stephen Gettelfinger, Washington, Indiana, 1998 WL 918589 (Ind. Off. Env. Adjud.)*.

There is no genuine issue as to any material fact. Summary judgment is granted in favor of IKEC.

10. IKEC has requested summary judgment and set out a *prima facie* case that Citizens Groups' Members are not harmed by drinking or using the water supplied by KWC or the City of Madison. Citizens Groups were then obligated to present sufficient evidence to establish a genuine issue of material fact. Under *Lujan, supra*, 504 U.S. at 566, this means that the Petitioners must provide a "factual showing of perceptible harm" in order to avoid a determination that summary judgment is proper. Even construing all facts and inferences in their favor, Groups have not presented sufficient evidence to support a finding of perceptible harm to any Member. Findings 11 & 12.

**Objection to the Approval of Solid Waste Facility Renewal  
Clifty Creek Station, Restricted Waste Site Type III, FP #39-4  
Jefferson County, Indiana  
2010 OEA 21, (02-S-J-2989)**

11. Nor have Groups raised a genuine issue of material fact sufficient to overcome the presumption (called for by the OEA cases above) that IKEC will continue to comply with 327 IAC § 2-11-2 and applicable statutes. The Findings of Fact above establish that ash has been disposed of at the now-permitted site for 55 years without incident or harm to any Member. Citizens Groups' expert, Mr. Norris, asserts that it is possible that an unspecified amount of ash constituents from the site (not specifically as a result of activities under the 2002 Permit Renewal) may reach the public water supply wells at an unspecified time in the future by an unspecified route in an unspecified concentration with an unspecified result. Citizens Groups then rely on these assertions as evidence that their Members are aggrieved "by the order." I.C. § 4-21.5-3-7(a). That is insufficient.
12. The Court cannot "presume" the missing facts. *See Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-89 (1990). Speculation by an expert is no more valid evidence than speculation by a layman.
13. An expert's opinion that something is "possible" or "could have been" is insufficient by itself to support a material factual question. *R.E.G. v. L.M.G.* (1991), Ind. App. 571 N.E.2d 298, 303. Testimony based on conjecture or speculation is insufficient to support a claim. *Id.* Qualitatively, evidence fails when it cannot be said reasonably that the intended inference may logically be drawn therefrom. *Ramon v. Glenroy Construction Company, Inc.* (1993), Ind. App. 609, N.E.2d 1123, 1132, *trans. denied*. The failure of an inference may occur as a matter of law when the intended inference can rest on no more than speculation or conjecture. *Id. Colen v. Pride Vending Serv.*, 654 N.E.2d 1159, 1163 (Ind. Ct. App. 1995), *reh'g denied, trans. denied; accord, Indiana & Mich. Power Co. v. Runge*, 717 N.E.2d 216, 234-35 (Ind. Ct. App. 1999), *reh'g denied; R.E.G. v. L.M.G.*, 571 N.E.2d 298, 303 (Ind. Ct. App. 1991); *see also Wright v. Quack*, 526 N.E.2d 216 (Ind. Ct. App. 1988) (discussing at length the concepts of "speculation" and qualitative insufficiency of evidence); *Jaramillo v. United States*, 357 F.Supp. 172, 175-76 (S.D. N.Y. 1973) (same).
14. The long string of OEA cases cited above forbid any such speculation and impose a presumption that IKEC will comply with 327 IAC § 2-11-2 and I.C. § 13-30-2-1. That rule forbids conduct that renders public water wells injurious. It does not require that a person conduct its affairs in such a way that a determined adversary cannot create a speculative scenario showing that the rule could possibly be violated in the indeterminate future. IKEC cannot lawfully be held to any such standard. If it were not possible for the standards of 327 IAC § 2-11-2(e) to be violated, there would be no need for the prohibition in the rule.
15. There is no genuine issue as to any material fact. Summary judgment is appropriate.

**Objection to the Approval of Solid Waste Facility Renewal  
Clifty Creek Station, Restricted Waste Site Type III, FP #39-4  
Jefferson County, Indiana  
2010 OEA 21, (02-S-J-2989)**

**FINAL ORDER**

AND THE COURT, being duly advised, hereby ORDERS, ADJUDGES AND DECREES that Indiana-Kentucky Electric Corporation has met its burden of proof by substantial evidence in this matter. IKEC's Motion for Summary Judgment on All Remaining Issues is GRANTED.

You are hereby further notified that pursuant to provisions of I.C. § 4-21.5-7-5, the Office of Environmental Adjudication serves as the Ultimate Authority in 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 I.C. § 4-21.5. Pursuant to I.C. § 4-21.5-5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served. This order disposes of this proceeding.

**IT IS SO ORDERED in Indianapolis, Indiana this 17th day of March, 2010.**

Hon. Catherine Gibbs  
Environmental Law Judge