

**Objections to Renewal of Solid Waste Permit No. FP 48-06**  
**Mallard Lake Landfill**  
**JM Corporation**  
**Anderson, Madison County, Indiana**  
**2011 OEA 26, (10-S-J-4347)**

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**OFFICIAL SHORT CITATION NAME:** When referring to 2011 OEA 26 cite this case as  
*JM Corporation, 2011 OEA 26.*

**TOPICS:**

hearing	municipal solid waste landfill unit
Final Order	MSWLF unit
solid waste	329 IAC 10-11-2.1(e)
landfill	329 IAC 10-11-5.1
bird	329 IAC 10-13-2
bird attractant	329 IAC 10-14-1
airport	329 IAC 10-14-2
renewal	329 IAC 10-16-1
administrative extension	329 IAC 10-2-116
<i>KCCA v. J.M. Corporation</i>	329 IAC 10-2-117
solid waste land disposal unit	329 IAC 10-2-119
municipal solid waste landfill	329 IAC 10-2-176
new municipal solid waste landfill unit	49 U.S.C. 44718

**PRESIDING JUDGE:**

Catherine Gibbs

**PARTY REPRESENTATIVES:**

IDEM: Valerie Tachtiris, Esq.  
Petitioners: Gregory Zubek, Esq., Larry Whitham, Esq. for KCCA;  
Whitham Hebenstreit & Zubek LLP  
Frank and Linda O'Neal, Richard and Betty Gooding, Pete V. Bitar; pro se  
Respondent: Sue Shadley, Esq., Amy Romig, Esq., John Ketcham, Esq.;  
Plews Shadley Racher & Braun, LLP  
Intervenor: Timothy Lanane, Esq.

**ORDER ISSUED:**

March 23, 2011

**INDEX CATEGORY:**

Land

**FURTHER CASE ACTIVITY:**

[none]

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1. On February 22, 2010, Frank and Linda O'Neal (the O'Neals) filed a petition for review with the OEA. On February 23, 2010, Richard E. Gooding, Sr. and Betty Gooding (the Goodings) filed a petition for review with the OEA. On February 26, 2010, the Killbuck Concerned Citizens Association, Inc., William Kutschera and Daniel B. Spall (collectively KCCA) filed their petition for review. On February 26, 2010, Pete V. Bitar filed a petition for review with the OEA.
2. On April 19, 2010, the City of Anderson moved to intervene in this matter. This motion was granted on May 7, 2010.
3. The IDEM filed its Motion to Dismiss on July 23, 2010. On the same date, JM Corporation filed its Motion for Summary Judgment.
4. The ELJ issued Findings of Fact, Conclusions of Law and Order on October 28, 2010. The Order provided:
  1. The IDEM's Motion to Dismiss is **GRANTED on all issues except as specified in paragraphs #2 and #3 below.**
  2. JMC's Motion for Summary Judgment is **DENIED** as to the following issues: whether JMC has complied with 329 IAC 10-16-1.
  3. To avoid dismissal of this matter, the Court grants leave to the Petitioners to amend their petitions for review, in a manner consistent with this Order, within ten (10) days on the following issues **ONLY. Failure to amend in a timely manner shall result in the dismissal of the petitions for review.**
    - Frank and Linda O'Neal shall amend their petition to specify which regulations IDEM failed to follow relating to their allegation that their well water will be affected.
    - Richard E. Gooding, Sr. and Betty Gooding shall amend their petition to specify which regulations IDEM failed to follow relating to their allegation that the Landfill will have an impact on surface and ground water.
    - Pete V. Bitar shall amend his petition to specify which regulations IDEM failed to follow relating to his allegation that the Landfill will have an impact on surface and ground water.
    - KCCA shall amend its petition to specify how (1) JMC has failed to comply with applicable regulations since the Permit was initially issued in 1988; (2) IDEM failed to consider certain environmental data; and (3) IDEM failed to follow applicable statutes and regulations regarding the issuance of the Permit.
5. KCCA and the Goodings filed amended Petitions on November 5, 2010.
6. A final prehearing conference was held on November 9, 2010. KCCA, the city of Anderson, the Goodings and Mr. Bitar appeared. The O'Neals did not appear.

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7. The final hearing was held on November 17 and 18, 2010.

**FINDINGS OF FACT**

1. The findings of fact set forth in the Findings of Fact, Conclusions of Law and Order issued on October 28, 2010 are incorporated herein.
2. In 1988, IDEM issued a solid waste operating permit to JMC. The permit authorized the operation of the Mallard Lake Landfill located at 3823 East 300 North, Anderson, Madison County, Indiana (the Landfill) as a municipal solid waste landfill.
3. Construction of the initial fill area was completed in late 1987.<sup>1</sup>
4. The operating permit was effective on July 2, 1998.<sup>2</sup>
5. The Permit's expiration date was July 2, 2003.
6. JMC submitted its renewal application on March 4, 2003.
7. On February 11, 2010, IDEM renewed Solid Waste Facility Permit No. FP 48-06 (the Permit) pursuant to the requirements of 329 IAC 10.
8. The Landfill has not received waste for disposal. The Indiana Supreme Court, in *KCCA v. J.M. Corporation*, 2011 Ind. LEXIS 70 (Ind. 2011), determined that JMC's facility included a container collection system and had received waste for storage.
9. The Landfill is located more 11,000 feet from the Anderson Municipal Airport.
10. On May 3, 1996, JMC notified the Federal Aviation Administration and the Anderson Municipal Airport that the Landfill would be located within a five-mile radius of the an airport runway.
11. Pursuant to I.C. § 4-21.5-3-26(f), the ELJ takes official notice of the fact that JMC was a corporation in good standing on March 4, 2003.<sup>3</sup>

**Applicable Law**

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<sup>1</sup> Stipulated Statement of Facts, filed August 18, 1992, Cause No. 89-S-J-208, attached as Exhibit A to J.M. Corporation's Motion and Brief in Support of Summary Judgment, filed on April 26, 2004, Cause No. 03-S-J-3185.

<sup>2</sup> The ELJ made this determination in *Mallard Lake Landfill*, 2004 OEA 82 (In. Off. Env. Adjud., October 20, 2004). The ELJ takes official notice of these proceedings pursuant to I.C. § 4-21.5-3-26(f)(2).

<sup>3</sup> See attached Exhibit 1 for JM Corporation found at [https://secure.in.gov/sos/online\\_corps/view\\_details\\_ppv.aspx](https://secure.in.gov/sos/online_corps/view_details_ppv.aspx).

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The Indiana Department of Environmental Management (IDEM) is authorized to implement and enforce specified Indiana environmental laws and rules promulgated relevant to those laws, pursuant to Ind. Code (I.C.) § 13. The Office of Environmental Adjudication (“OEA”) has jurisdiction over the decisions of the Commissioner of the IDEM and the parties to this controversy pursuant to I.C. § 4-21.5-7-3.

KCCA alleges that JMC failed to make a timely application for renewal of the Permit under 329 IAC 10-11-5.1. This regulation requires that an application for renewal must be submitted “at least one hundred twenty (120) days prior to the expiration date of the permit or the permit will be invalid upon expiration.”

KCCA further alleges that JMC’s permit application was deficient for failure to comply with 329 IAC 10-11-2.1(e). This regulation requires the applicant, if it is a corporation, to include a certificate of existence signed by the secretary of state. 329 IAC 10-11-5.1 requires a permit renewal application to comply with most of the requirements of 329 IAC 10-11-2.1, including 2.1(e).

KCCA also argues that the Permit was improperly issued because IDEM did not consider JMC’s non-compliance with certain regulations. 329 IAC 10-13-2<sup>4</sup> requires the following:

The commissioner shall review the application to determine whether the solid waste land disposal facility or the operation is in compliance with the plans and specifications in its existing permit. The commissioner may request clarification or supplementation of information submitted in support of the renewal application. The commissioner shall evaluate the facility's compliance record under:

- (A) the operational requirements of 329 IAC 10-20, 329 IAC 10-28, or 329 IAC 10-36 as appropriate; and
- (B) any prior or existing permit conditions.

KCCA contends that the IDEM erred in issuing the Permit because JMC had not complied with the requirements of 329 IAC 10-14-1 and 329 IAC 10-14-2. 329 IAC 10-14-1 requires the owner or operator of a “solid waste land disposal facility” “that is open to accept solid waste for disposal”<sup>5</sup> to submit quarterly reports to the IDEM. 329 IAC 10-14-2 requires a “solid waste land disposal facility” “that is open to accept solid waste for disposal” to install weighing scales.

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<sup>4</sup> The Petitioners did not specify which regulation supports their contention that the IDEM must consider the applicant’s compliance record. The ELJ assumes that this is the appropriate regulation.

<sup>5</sup> 329 IAC 10-14-1(c).

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The Supreme Court of Indiana, in *KCCA v. J.M. Corporation*, 2011 Ind. LEXIS 70 (Ind. 2011)<sup>6</sup>, for purposes of determining whether I.C. §13-20-2-11 was applicable, held that JMC's "facility" had accepted waste prior to April 2008 based on JMC operating a collection container system at the facility. However, the Court distinguished between the terms "facility" and "landfill" saying "The term [facility] includes solid waste landfills, id., but it is not limited to them." *KCCA* at 76. "Put another way, JMCs facility includes both its landfill (disposal operation) and collection container system (storage operation)." *KCCA* at 77.

329 IAC 10-2-176 defines "solid waste land disposal facility" as "a permitted facility that accepts solid waste for deposit and covering in or on the ground surface. Permitted solid waste land disposal facilities must be classified into one (1) of the following types: (1) Municipal solid waste landfill (MSWLF). (2) Construction/demolition site. (3) Restricted waste site. (4) Non-municipal solid waste landfill.

329 IAC 10-2-116 defines "municipal solid waste landfill" as "a solid waste land disposal facility that is:

- (1) permitted to accept municipal solid waste; and
- (2) not:
  - (A) a land application unit;
  - (B) a surface impoundment;
  - (C) an injection well; or
  - (D) a waste pile.
- (b) An MSWLF is a sanitary landfill for purposes of I.C. § 13-20-21. Such a landfill may be publicly or privately owned.

329 IAC 10-2-117 defines "Municipal solid waste landfill unit" or "MSWLF unit" as:

- (a) "Municipal solid waste landfill unit" or "MSWLF unit" means a discrete area of land or an excavation that is:
  - (1) permitted to accept municipal solid waste for disposal; and
  - (2) not:
    - (A) a land application unit;
    - (B) a surface impoundment;
    - (C) an injection well; or
    - (D) a waste pile.
- (b) The landfill may be publicly or privately owned. An MSWLF unit may be a new MSWLF unit, an existing MSWLF unit, or a lateral expansion.

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<sup>6</sup> This decision was issued February 10, 2011, after post-hearing briefs and proposed findings of fact, conclusions of law and orders were filed. None of the parties have requested leave to address the effect of this decision. The ELJ, *sua sponte*, addresses the effect of this decision on this matter.

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In accordance with 329 IAC 10-2-119, a “New municipal solid waste landfill unit” or “new MSWLF unit” is defined as ““New municipal solid waste landfill unit" or "new MSWLF unit" means any MSWLF unit that has not received solid waste.”

Lastly, KCCA asserts that the permit application was deficient in that JMC failed to comply with 329 IAC 10-16-1 and that the Landfill is a bird attractant and thus, presents a danger to aircraft and persons using and living in the area of Anderson Municipal Airport. This regulation requires that the permit applicant demonstrate that a landfill located less than 10,000 feet from an airport will not create a bird hazard to aircraft. If the landfill is located within five (5) miles of an airport, the applicant must notify the airport and the Federal Aviation Administration.

329 IAC 10-16-1(f) states, “A new MSWLF must not be permitted within six (6) miles of a public airport as specified under 49 U.S.C. Sec. 44718 unless the MSWLF permittee has been granted an exemption under 49 U.S.C. Sec. 44718.” 49 U.S.C. 44718 does not apply to landfills that were constructed prior to the law’s effective date (April 5, 2000).

**CONCLUSIONS OF LAW**

1. The OEA has subject matter jurisdiction to hear the petitions for review as the petitions request review of a decision made by the IDEM Commissioner. Further, the Court concludes that the petitions were timely filed.
2. This office 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). Further, OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Envntl. Adjud.*, 811 N.E.2d 806, 809 (Ind. 2004) (appeal of OEA review of NPDES permit); *see also* I.C. § 4-21.5-3-14; I.C. § 4-21.5-3-27(d).
3. The Goodings failed to amend their petition for review in accordance with the October 28, 2010 Order issued by the presiding ELJ. Further, the Goodings failed to appear at the final hearing in this matter. The Petition for Review filed by Richard E. Gooding, Sr. and Betty Gooding is **DISMISSED** for failure to comply with the Court’s order and for failure to present evidence regarding the objections specified in the Petition for Review.
4. Mr. Bitar and the O’Neals failed to amend their petitions for review in accordance with the October 28, 2010 Order issued by the presiding ELJ. Frank and Linda O’Neal and Pete V. Bitar’s claims relating to ground or surface water contamination are **DISMISSED**.
5. JMC submitted its application on the 120<sup>th</sup> day prior to the Permit’s expiration date. JMC’s submission of the Permit renewal application was timely.

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6. Even if the application was not timely, 329 IAC 10-11-5.1(b) does not preclude the issuance of a renewal. This regulation administratively extends the effectiveness of a permit in the event that the IDEM does not complete its review prior to a permit's expiration date. If a permittee fails to file its renewal application on time, the consequence is that the permit expires. There is no provision that the IDEM is then precluded from issuing the renewal once it completes its review, as it did in this case.
7. Further, in this case, the Permit is an operating permit. Whether the permit expired is a moot point as the Landfill did not operate between 2003 and IDEM's issuance of the renewal.
8. While a permit applicant has the obligation to submit a complete renewal application, the IDEM must also review the application for completeness and give the applicant the opportunity to supplement its application before it is denied. I.C. § 13-15-4-9. Therefore, if JMC failed to submit its statement of existence, the proper course of action for IDEM would not be to *deny* the permit, but rather to request the required information. The permit could only be denied if the permittee then failed to submit the requested information. Additionally, the Petitioners failed to show that JMC was not a corporation in good standing at the time of the renewal application was submitted. A search of the Secretary of State's website<sup>7</sup> revealed that JMC was, in fact, a corporation in good standing at the time the renewal application was submitted.<sup>8</sup> OEA finds that the failure to submit the Certificate of Existence in compliance with 329 IAC 10-11-2.1(e) is not grounds for revocation of the permit renewal. The OEA will not impose such an extreme sanction for failure to comply with a requirement that can be accurately and readily determined by resort to sources whose accuracy cannot be reasonably questioned.
9. The regulations, 329 IAC 10-14-1 and 329-10-14-2, deal with submitting quarterly reports and having weighing scales on site, respectively. However, each of the rules at issue applies only to landfills that are accepting waste. Specifically, 329 IAC 10-14-1(c) states that the rule regarding submission of quarterly reports applies to a site "that is *open to accept solid waste for disposal.*" (Emphasis added). 329 IAC 10-14-2(a)(2)(A) contains a similar exception, noting that "[e]xisting solid waste land disposal facilities required to install weighing scales under the following conditions: (A) The solid waste land disposal facility is *open to accept solid waste for disposal.*" (Emphasis added). The landfill at issue has never accepted solid waste for disposal, and thus the permittee was not required to submit quarterly reports or have weighing scales on site.

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<sup>7</sup> Pursuant to I.C. § 4-21.5-3-26(f), the administrative law judge may take official notice of any fact that could be judicially noticed. Per Indiana Rules of Evidence 201(a) a court may take judicial notice of a fact that is not subject to reasonable dispute in that is "capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." The ELJ concludes that the Indiana Secretary of State's website, when determining whether a corporation doing business in Indiana is in good standing, is a source whose accuracy cannot be reasonably questioned.

<sup>8</sup> The fact that JMC was in good standing at the time of the hearing is irrelevant. The question is what its status was at the time the renewal application was submitted.

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10. Moreover, 329 IAC 10-13-2 does not require compliance with the provisions of 329 IAC 10-14. Therefore, as the Petitioners failed to present any evidence that such compliance was necessary or that JMC was not in compliance with (a) the requirements of 329 IAC 10-14-1 and 329-10-14-2 or (b) with the “operational requirements of 329 IAC 10-20, 329 IAC 10-28, or 329 IAC 10-36 as appropriate”<sup>9</sup>, the Petitioners have failed to meet their burden of proof on this objection.
11. The Supreme Court’s determination that the “facility”, in the form of a container collection system, accepted waste is not conclusive here. The Court distinguished between accepting waste for storage versus accepting waste for disposal and held that JMC had accepted waste for storage. As the remaining Petitioners failed to prove that the landfill accepted waste for disposal, the requirements of 329 IAC 10-14-1 and 329 IAC 10-14-2 are not applicable.
12. While it may be true that the Landfill will be a bird attractant and therefore, may create a bird hazard at the airport, this, alone, is not sufficient to determine whether that the Permit was properly issued. The standard is whether the Permit complies with all written criteria contained within the relevant rules and statutes. The Solid Waste Management Board, as the board with the authority to promulgate rules relating to solid waste, decides what an acceptable risk to human health and the environment is.
13. KCCA alleges that since the landfill at issue has never accepted waste, it meets the definition of a “new MSWLF Unit.” However, the Mallard Lake Landfill is a “MSWLF” not a “MLSWLF unit.” *Compare* 329 IAC 10-2-116 and 329 IAC 10-2-117.
14. Since the Mallard Lake Landfill is not a new MSWLF, and is more than 10,000 feet from the Anderson Airport, pursuant to 329 IAC 10-16-1, it is only required to complete “[n]otification to the affected airport and the Federal Aviation Administration (FAA) of the intent to site a solid waste land disposal facility.” KCCA has not demonstrated that the applicant and the IDEM failed to meet the requirements of 329 IAC 10-16-1.
15. The Landfill was constructed prior to 2000. Therefore, 49 U.S.C. 44718 is not applicable.

**FINAL ORDER**

IT IS THEREFORE **ORDERED, ADJUDGED AND DECREED** that the Petitions for Review filed by the Petitioners are **DISMISSED**.

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

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<sup>9</sup> 329 IAC 10-13-2(A)

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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.

**IT IS SO ORDERED this 23rd day of March, 2011 in Indianapolis, IN.**

Hon. Catherine Gibbs  
Environmental Law Judge