STATE OF INDIANA	)	MARION SUPERIOR COURT
	)	ENVIRONMENTAL DIVISION
COUNTY OF MARION	)	CAUSE NO. 49D02-1507-MI-024524

FLM, LLC,	)
	)
Plaintiff,	)
	)
v.	)
	)
OFFICE OF ENVIRONMENTAL AJUDICATION, THE INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, AND THE OFFICE OF THE INDIANA ATTORNEY GENERAL,	)
	)
Defendants.	)

ORDER ON FLM, LLC'S PETITION FOR JUDICIAL REVIEW AND REQUEST FOR STAY OF FINAL ORDER

Plaintiff, FLM, LLC ("FLM") petitions for judicial review of an Office of Environmental Adjudication ("OEA") order claiming the Chief Environmental Law Judge's (CELJ) summary judgment order is arbitrary, capricious and contrary to law. The Court affirms in part and reverses in part

Facts

This case involves serious environmental consequences stemming from a failed business venture involving three parties**. FLM** owns certain property ("the Property") in Marion County. FLM leased the Property to International Recycling, Inc. ("IRI") in 1999. **IRI** operated a spent foundry sand recycling business. IRI contracted with Daimler Chrysler Corporation ("Chrysler") to store **Chrysler**'s spent foundry sand on the leased FLM Property. IRI intended to either dispose of or sell the spent sand for reuse. Initially, IRI was in IDEM compliance for storage of the foundry sand. [1] Chrysler encountered financial difficulties and quit paying IRI in 2002. IRI quit paying rent to FLM and abandoned the sand on the Property in 2003. Chrysler's refusal to pay pursuant to its contract with IRI, forced IRI out of business. IDEM received a complaint

[1 1] *FLM, LLC v. Cincinnati Ins. Co*., 973 N.E. 2d 1167, 1170(Ind.Ct. App. 2012) *trans. denied.*

about the giant sand pile[2] from an adjacent property owner and conducted an investigation on 10/30/2003. By letter dated December 2003, IDEM advised IRI, FLM and Chrysler they were investigating complaints about the foundry sand pile on the Property.

Based on the October 2003 investigation, IDEM issued a 5/17/2004 Notice of Violation of environmental statutes and rules to IRI, FLM, and Chrysler[3] listing possible violations arising from the sand pile on the Property. (IDEM *Notice of Violation*, 5/18/2004, Admin. R. p. 144, hereinafter "2004 Notice".)

On **April 6, 2006**, IDEM issued a Notice and Order of the Commissioner of the Department of Environmental Management ("2006 Order") to Respondents. The 2006 Order was issued against all three Respondents: International Recycling, Inc.; FLM, LLC; and Daimler Chrysler Corporation. The only finding as to FLM, individually, was that it owned the site upon which IRI operated a foundry sand recycling business. (2006 Order, Admin.R. p. 82 ¶5, ¶7; *IDEM's Motion for Summary Judgment against FLM*, Ex. C, Admin. R. p.147.) The balance of the 2006 Order referenced Respondents as a group. The 2006 Order found "Respondents caused and/or allowed waste foundry sand, a contaminant, to be open dumped at the Site in violation of 329 IAC 10-4-2 and 329 IAC 10-4-3, thus violating IC 13-30-2-1(5)." (2006 Order ¶ 9, Admin. R. p. 82, April 6, 2006.) The 2006 Order also found Respondents violated I.C. 13-30-2-1(4).

[2] Known locally as "Black Mountain". FLM, LLC's *Response to IDEM's Motion for Summary Judgment*, Ex. "A" p.1.

[3] **13-30-3-3 Notice of violation**; offer of opportunity to enter into agreed order; failure to enter into agreed order
(a) The commissioner shall:
(1) notify the alleged violator in writing that the commissioner believes a violation may exist; and
(2) offer the alleged violator an opportunity to enter into an agreed order providing for:
(A) the actions required to correct the violation; and
(B) if appropriate, the payment of a civil penalty.
(b) The commissioner is not required to extend the offer under subsection (a) (2) for more than sixty (60) days.
(c) An alleged violator may enter into an agreed order without admitting that the violation occurred.
(d) A notification under this section does not constitute a notice of violation for purposes of IC 14-34-3-3(20).
(e) If an agreed order is not entered into, the commissioner may proceed under section 4 of this chapter to issue a notice and order.

The Commissioner ordered Respondents to immediately comply with I.C. 13-30-2-1(5)[4] by ceasing to cause or allow the open dumping of waste foundry sand at the site (Order ¶1); ceasing to allow the deposit of waste foundry sand (Order ¶2); and, ceasing to allow the storage of waste foundry sand (Order ¶3). Further, the Commissioner ordered Respondents to cease open dumping or maintaining an open dump by removing the sand located at the site within 90 days. (Order ¶4.) (*2006 Order*, Admin. R. p. 85, April 6, 2006.)

FLM petitioned for administrative review of the 2006 Order on April 21, 2006. FLM's petition served to stay the 2006 Order. [5] IRI did not appeal the 2006 Order and the OEA issued a Final Order of Dismissal to IRI on May 24, 2006. As IRI did not file a request to appeal the order, the OEA did not acquire jurisdiction to review the order. (Ind. Code 4-21.5.7.3, I.C.13-30-3-5.) A few years thereafter, Chrysler filed a notice of suggestion of bankruptcy and any action against Chrysler became subject to an automatic stay. (11 U.S.C.A. §362.) (May 18, 2009 *Notice of Suggestion of Bankruptcy*, Office of Environmental Adjudication.)

Circumstances left FLM as the remaining party in this action. This foundry sand pile on the Property has spawned much litigation, generally over who will pay for the sand's removal. FLM initiated litigation against IRI, Chrysler, and IRI's insurer[6]. (*FLM's Petition for Administrative Review*, Admin. R. p. 9.) The 2006 Order was stayed during the long years of litigation.

On September 29, 2014, IDEM filed a motion for summary judgment against FLM only. IDEM contended that FLM is the owner of property upon which an open dump is located and is responsible for remedying the open dumping citing I.C. 13-30-2-1, IAC 10-4-2, IAC10-4-3, and IAC 10-4-4(a). IDEM designated: a memorandum of law in support of its motion; FLM's Petition for Administrative Review; the inspection summary letter from the 10/30/2003

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[4] **13-30-2-1 Specific acts prohibited**

Sec. 1. A person may not do any of the following:

….

(5) Dump or cause or allow the open dumping of garbage or of any other solid waste in violation of rules adopted by the board.

[5] Ind. Code 13-30-3-5

[6] *FLM, LLC v. Cincinnati Ins. Co*., 973 N.E. 2d 1167(Ind.Ct. App. 2012) *trans. denied; appeal after remand*, 24 N.E. 3d 444(Ind. Ct. App. 2015) Aff'd on Reh. 27 N.E.3d 1141, *trans. denied.*

inspection; the 5/17/2004 Notice of Violation; the 2006 Order of the Commissioner; and, a February 13, 2012 inspection summary letter which stated the foundry sand pile was still present on the site. (*IDEM's Motion for Summary Judgment against FLM*, Admin. R. p. 120.) FLM responded to IDEM's summary judgment and designated an affidavit of Paul Troy which stated the sand could be reused and listed his efforts to promote reuse of the sand along with attached exhibits containing estimates for the foundry sand removal either through disposal or reuse. (Affidavit of Paul Troy, Ex. "A" Admin. R. p. 186-191.) Although not designated by the parties, the Court takes judicial notice of the appellate opinions issued in *FLM, LLC v. Cincinnati Ins. Co*., 973 N.E. 2d 1167(Ind.Ct. App. 2012) *trans. denied; appeal after remand*, 24 N.E. 3d 444(Ind. Ct. App. 2015) Aff'd on Reh. 27 N.E.3d 1141, *trans. denied.* The rules of evidence permit a court to take judicial notice at any stage of a proceeding on its own motion. Evid. R. 201; *City of Crown Point v. Misty Woods Properties, LLC*, 864 N.E. 2d 1069, 1083 (Ind. Ct. App. 2007) (citing footnote 2).

The OEA issued its Order on June 26, 2015("OEA Order"). The OEA Order found that the 2006 Order treated the three Respondents together and failed to differentiate between Respondents in the Findings of Violations section or in the Order section. Finally, the OEA granted summary judgment to IDEM finding:

- that the waste foundry sand on FLM's Property is an open dump (OEA Order, ¶12);
- that FLM caused or allowed the foundry sand to be open dumped at the site in violation of 329 IAC 10-4-3, I.C. 13-11-2-146 and 13-11-2-147 (OEA Order, ¶13); and
- That FLM caused or allowed the deposit of unauthorized solid waste on its Property, in violation of IC 13-30-2-1(4). (OEA Order ¶16.)

(OEA Order, Admin. R. p. 236-246.)

The OEA Order found a genuine issue of material fact as to whether FLM violated 329 IAC 10-4-2, concerning whether the foundry sand migrated causing a threat to human health or the environment. (OEA Order ¶14.) The OEA Order affirmed the entire 2006 Order as to FLM, except as to ¶ 7 regarding civil penalties, and found FLM responsible for waste foundry sand

disposal at the site[7]. FLM appeals and presents four issues for review which the Court consolidates and addresses below.

ISSUE

Whether the OEA's Order granting summary judgment in favor of IDEM was arbitrary and capricious?

STANDARD OF REVIEW

When reviewing a decision from an administrative agency, a trial court may only grant relief if the actions of the agency are:

> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (2) contrary to constitutional right, power, privilege, or immunity;
> (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> (4) without observance of procedure required by law; or
> (5) unsupported by substantial evidence.

I.C. §4-21.5-5-14. "A decision is arbitrary and capricious when it is made without any consideration of the facts and lacks any basis that may lead a reasonable person to make the same decision made by the administrative agency." *Ind. Dept. of Envtl. Mgmt. v. Schnippel Const.*, 778 N.E. 2d 407, 412 (Ind. Ct. App. 2002). Additionally, an interpretation of statutes and regulations by an administrative agency charged with the duty of enforcing those regulations and statutes is entitled to great weight unless this interpretation would be inconsistent with the law itself. *Ind. State Bd. of Educ. v. Brownsburg Cmty. Sch. Corp*., 865 N.E. 2d 660, 665 (Ind. Ct. App. 2007).

[7] An administrative law judge is not bound by the requirements of I.C. 13-30-9-3, which requires a trial court resolving an environmental legal action to allocate the cost of the removal or remedial action in proportion to the acts or omissions of each party, without regard to any theory of joint and several liability, using legal and equitable factors that the court determines are appropriate, including those set forth by statute. I.C. 13-30-9-3(a). A court is also permitted to allocate costs among liable parties using appropriate equitable factors under a federal CERCLA action. 42 U.S. C. § 9613(f). An ALJ is not obligated to allocate costs among respondents held collectively liable and an ALJ's failure to do so is not a basis for invalidating a Commission Order.

A trial court reviewing a grant of summary judgment from an administrative agency may only be affirmed if, "after drawing all reasonable inferences in favor of the non-moving party, the designated evidence shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *5200 Keystone Ltd. Realty, LLC v. Netherlands Ins. Co*., 29 N. E. 3d 156, 160 (Ind. Ct. App. 2015). The summary judgment movant must first demonstrate the absence of any genuine issue of fact as to a determinative issue before the burden shifts to the non-movant to come forward with contrary evidence showing an issue for the trier of fact. *Hughley v. State*, 15 N.E. 3d 1000, 1003 (Ind. 2014). Lastly, summary judgment is inappropriate when the designated evidence supports conflicting reasonable inferences as to a genuine fact. *Ind. Restorative Dentistry, P.C. v. Lavin Ins. Agency, Inc*., 27 N.E. 3d 260, 264 (Ind. 2015).

DECISION

The Court affirms in part and reverses in part the OEA Order and remands for further proceedings consistent with this opinion.

I

The Court reverses those portions of the OEA Order which found FLM caused or allowed the deposit or dumping of solid waste upon the Property. As a preliminary matter, the Court observes this cause is an appeal from a decision on a motion for summary judgment seeking to confirm the 2006 Order as to FLM rendered by an administrative law judge from the OEA. The CELJ must consider the motion as would a trial court considering a summary judgment motion filed under Trial Rule 56. I.C. §4-21.5-3-23; *Ind. Dept. of Envtl. Mgmt. v. Schnippel Const*., 778 N.E. 2d 407, 412 (Ind. Ct. App. 2002).

The 2006 Order claimed Respondents (FLM, Chrysler, and IRI) violated I.C. §13-30-2-1(4) and I.C §13-30-2-1(5). Generally, these sections prohibit causing or allowing the deposit or dumping of solid waste upon land.[8] . The Court first notes that the term "person" as used in I.C. 13-30-2-1 includes a corporation, such as FLM. I.C. 13-11-2-138.

[8] **I.C. §13-30-2-1(4); I.C §13-30-2-1(5)** (emphasis added).
A person may not do any of the following:
….

The OEA Order found "No genuine issue of material fact exists that FLM 'caused or allowed' the waste foundry sand to be deposited on land owned by FLM, both directly, and through its business arrangement with the other two Respondents." (OEA Order, ¶ 8, p.6 Admin. R. p. 241.) The Court has reviewed the designated materials, and finds no evidence that FLM caused or allowed the waste foundry sand to be deposited on its property. There is evidence that FLM is the owner of property upon which solid waste has been deposited. The Commissioner's relevant finding of fact is that IRI stored foundry sand generated by Chrysler on property owned by FLM. (2006 Order, ¶ 7.) The only finding as to FLM is that FLM owned the Property. This finding is insufficient to establish as a matter of law that FLM, by itself; deposited[9], dumped, caused or allowed the foundry sand upon the Property. As there was no evidence that FLM caused or allowed dumping of the foundry sand upon its Property, the Court finds IDEM has failed to carry its burden that no genuine issue of material fact exists as to whether FLM caused or allowed the dumping of solid waste upon its Property.

IDEM, as the moving party, has the initial burden of proving the absence of a genuine issue of material fact as to an outcome-determinative issue. *Jarboe v. Landmark Cmty. Newspapers of Ind*., 644 N.E.2d 118, 123 (Ind.1994). IDEM's designated evidence is insufficient as a matter of law to establish that FLM deposited, dumped, caused or allowed the foundry sand upon the Property. Neither does the designated evidence detail a business

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(4) Deposit or cause or allow the deposit of any contaminants or solid waste upon the land, except through the use of sanitary landfills, incineration, composting, garbage grinding, or another method acceptable to the board.
(5) Dump or cause or allow the open dumping of garbage or of any other solid waste in violation of rules adopted by the board.

[9] I.C. 13-11-2-57
. (a) "**Disposal**", for purposes of environmental management laws, means the:
(1) discharge;
(2) deposit;
(3) injection;
(4) spilling;
(5) leaking; or
(6) placing;
of any solid waste or hazardous waste into or on any land or water so that the solid waste or hazardous waste, or any constituent of the waste, may enter the environment, be emitted into the air, or be discharged into any waters, including ground waters.
(b) "Disposal", for purposes of IC 13-29-1, means the isolation of waste from the biosphere in a permanent facility designed for that purpose.
(c) "Disposal", for purposes of IC 13-22-12-3.5, means all forms of disposal in or on the land, including underground injection.

arrangement with IRI and Chrysler that would establish that FLM "caused or allowed" the waste foundry sand be deposited on its Property. (Admin.R. p. 120.) While this information may appear elsewhere, the Court is limited to the materials properly designated by the parties. *Bourbon Mini-Mart, Inc. v. Commissioner, Indiana Dep't. of Envtl. Mgmt,* 806 N.E. 2d 14, 25(Ind. Ct. App. 2004).

The OEA Order finding that FLM caused or allowed the foundry sand to be deposited on the Property fails on a second basis. The 2006 Order is premised upon a finding that all three Respondents; Chrysler, IRI and FLM, "caused or allowed waste foundry sand, a solid waste, to be open dumped at the Site." (2006 Order ¶ 12.) IDEM asks the Court to infer from the 2006 Order's collective reference to Respondents that FLM, a single Respondent, caused or allowed the waste foundry sand to be open dumped at the site. Trial Rule 56(C) does not permit a court to make inferences in favor of the party moving for summary judgment. The Court may not resolve conflicting inferences in favor of the party moving for summary judgment. "The movant bears the burden of establishing the propriety of summary judgment, and all facts and inferences to be drawn therefrom are viewed in a light most favorable to the non-movant." *Newhouse v. Farmers Nat'l Bank,* 532 N.E.2d 26, 28 (Ind. Ct. App. 1989) (emphasis added). *See also, Reed v. Reid*, 980 N.E. 2d 277, 285 (Ind. 2012). The Court must refrain from resolving factual disputes or conflicting inferences when ruling on a motion for summary judgment. *Ind. Restorative Dentistry*, 27 N.E. 3d 260, 262; *Elmer v. Indiana Dept. of State Revenue,* 42 N.E. 3d 185, 197 (Ind. Ct. App. 2015).

The Court FINDS those portions of the 2006 Order finding that FLM caused or allowed the dumping of solid waste upon its Property are arbitrary, capricious, and unsupported by substantial evidence.

II

FLM contends the OEA Order is arbitrary, capricious, and not in accordance with law for affirming the 2006 Order on the basis of landowner liability when the 2006 Order fails to specify a violation of 329 IAC 10-4-4 (hereinafter "Landowner Responsibilities"). IDEM argues that FLM was given adequate notice of its landowner responsibilities. The court affirms the OEA

Order finding FLM is subject to an IDEM enforcement action for a deposit of solid waste on its Property.

Indiana administrative bodies have long been required to provide charges and prepare written findings to persons subject to a hearing.

> 'The maintenance of proper standards on the part of administrative agencies in the performance of their quasijudicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is in their manifest interest. For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play.'

Securities Commission of Indiana v. Holovachka, 234 Ind. 135, 124 N.E. 2d 380, 381-382 (Ind. 1955) *quoting, Morgan v. United States*, 1938, 304 U.S. 1, 22; 58 S.Ct.773, 778. Indiana, by statute, requires that notice of administrative proceedings be given to an alleged violator specifying the provision of the environmental laws allegedly being violated. [10]

The purpose of an administrative complaint is to give the responding parties notice of the charges against them. *Indiana Office of Envtl. Adjudication v. Kunz,* 714 N.E. 2d 1190, 1195

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[10] **13-30-3-4 Notice; contents**

Sec. 4. (a) The commissioner shall issue written notice to an alleged violator in accordance with IC 13-14-2-1.

(b) The notice must:

(1) specify the provision of:

(A) the environmental management laws;

(B) the air pollution control laws; or

(C) the water pollution control laws; or

(D) the rule;

allegedly being violated;

(2) include:

(A) a statement of:

(i) the manner in which; and

(ii) the extent to which;

the alleged violation exists; and

(B) an order under sections 10 through 12 of this chapter:

(i) requiring that the alleged violator take specific action to correct the violation;

(ii) assessing a civil penalty under IC 13-30-4-1, IC 13-30-4-2, and section 11 of this chapter for the violation; or

(iii) containing the substance of both item (i) and item (ii); and

(3) include a brief description of the procedure for requesting review under IC 4-21.5.

(c) A copy of the notice and order may also be sent to a local governmental unit that is a party to the action.

(Ind. Ct. App. 1999.) "Notice is adequate if the parties are sufficiently apprised of the nature of the proceedings so that there is no unfair surprise or are clearly apprised of the character of the action proposed and enough of the basis upon which it rests to enable them intelligently to prepare for it." 2 Am. Jur. 2d Administrative Law § 280.

The Owner's Responsibilities section provides, in pertinent part:

> Sec. 4. (a) The owner of real estate upon which an open dump is located is responsible for the following:
> (1) Correcting and controlling any nuisance conditions that occur as a result of the open dump. Correction and control of nuisance conditions must include:
> (A) removal of all solid waste from the area of the open dump and disposal of such wastes in a solid waste land disposal facility permitted to accept the waste; or
> (B) other methods as approved by the commissioner.

329 IAC 10-4-4(a). IDEM initiated an administrative proceeding against the Respondents when it issued a Notice of Violation on May 18, 2004. IDEM's notice provided in relevant part: "Respondent FLM, LLC owns the property at the Site on which International Recycling, Inc. operates." (2004 Notice, ¶ 2, Admin. R. p. 143, emphasis added.) Also, "International Recycling, Inc. is storing spend foundry sand generated by Daimler Chrysler Corporation's Indianapolis Foundry on property owned by FLM. LLC. (2004 Notice, ¶ 5, Admin.R. 144, emphasis added.) The 2004 Notice then goes on to list the open dumping statutes IC 13-30-2-1(4) and IC 13-30-2-1(5). The 2006 Order states, "Respondent FLM, LLC owns the property at the Site on which International Recycling, Inc. operated" (2006 Order ¶ 5, Admin. R. p. 147, emphasis added.) The Notice and Order do not reference the Owner's Responsibilities section.

A plain reading of the 2006 Order shows that FLM was adequately apprised IDEM claimed their open dumping liability stemmed from FLM's ownership of the Property. FLM does not dispute their ownership of the Property or that solid waste in the form of foundry sand is on the Property. While the 2006 Order also raises other bases for liability, the only finding as to FLM alone stemmed from their ownership of the Property. (2006 Order, ¶ 5, Admin. R. p. 147.) Certainly, the better practice is strict adherence to the notice requirements of I.C. 13-30-3-4. However when, as here, the contents of an order fairly provide a party with information

concerning the provision of environmental laws allegedly violated, the Court finds no error. The Court observes that a party who fails to receive any notice of an order of the Commissioner must make a showing of substantial prejudice to invalidate the order. I.C. 13-14-2-1(f). The Court finds that FLM was apprised its open dumping liability stemmed from FLM's ownership of the Property, despite IDEM's failure to include 329 IAC 10-4-4(a) in the 2006 Order, and absent any claim of prejudice the court affirms the OEA grant of summary judgment on the basis of FLM's landowner responsibility.

The Court AFFIRMS that portion of the OEA Order granting summary judgment to IDEM on the basis of FLM's landowner responsibility.

III

FLM contends even if it is held responsible as a landowner, the OEA Order is arbitrary and capricious because there is a genuine issue of fact whether the sand was stored or disposed. Indiana law defines an open dump as, "the consolidation of solid waste from one (1) or more sources or the disposal of solid waste at a single disposal site…" I.C. 13-11-2-146 (emphasis added). Solid waste that has been stored for longer than six months is presumed to have been disposed. 329 IAC 10-2-181. There is no disagreement that the foundry sand is solid waste.[11]

[11] I.C. 13-11-2-205.
(a) "**Solid waste**", for purposes of IC 13-19, IC 13-21, IC 13-20-22, and environmental management laws, except as provided in subsection (b), means any garbage, refuse, sludge from a waste treatment plant, sludge from a water supply treatment plant, sludge from an air pollution control facility, or other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, or agricultural operations or from community activities. The term does not include:
(1) solid or dissolved material in:
(A) domestic sewage; or
(B) irrigation return flows or industrial discharges;
that are point sources subject to permits under Section 402 of the Federal Water Pollution Control Act Amendments (33 U.S.C. 1342);
(2) source, special nuclear, or byproduct material (as defined by the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.));
(3) manures or crop residues returned to the soil as fertilizers or soil conditioners as part of a total farm operation; or
(4) vegetative matter at composting facilities registered under IC 13-20-10.
(b) "Solid waste", for purposes of IC 13-20-5, IC 13-20-22, and IC 13-21, does not include the following:
(1) A waste that is regulated under the following:
(A) IC 13-22-1 through IC 13-22-8.
(B) IC 13-22-13 through IC 13-22-14.
(2) An infectious waste (as defined in IC 16-41-16-4) that is disposed of at an incinerator permitted under rules adopted by the board to dispose of infectious waste.

FLM argues it rebutted the presumption the sand was disposed with its designated evidence that the sand could be beneficially reused and, in fact, a portion of the sand was approved for use in a 2007 City of Indianapolis project at the Ertel site. (Admin. R. p. 192-194; Troy Aff. Admin. R. p. 187-88.) The solid waste disposal definition provides in part, "It must be a rebuttable presumption that storage of waste for more than six (6) months constitutes disposal." 329 IAC 10-2-181. Under this definition, the sand was "disposed" by 2003 after IRI abandoned the Property. The assumption of disposal was rebutted by FLM's designation of a beneficial use of the sand in 2007. However, the rebuttable presumption of disposal arose again six months after its beneficial reuse on the City project. By statute, after FLM had stored the sand on their Property for six months--post 2007, a presumption arose by force of law that it had been disposed. FLM has designated no evidence rebutting the presumption of disposal which arose six months after the 2007 reuse of a portion of the sand. The Court finds that evidence a portion of the sand was used eight years ago in a City project is too far removed in time as a matter of law to rebut the statutory presumption of disposal.

Neither does FLM's evidence designated in the Troy affidavit, that the sand has a beneficial reuse and that FLM has a plan for its reuse, create a genuine issue as to a material fact. The Court, like the CELJ, draws an inference in favor of FLM that the sand has a beneficial reuse. The Court is not resolving "the parties' differing accounts of the truth", *Hughley v. State*, 15 N.E. 3d 1000, 1004 (Ind. 2015) but concluding the sand has potential reuse. Yet, the sand still sits as a black mountain on FLM's Property for eight years after the six month disposal presumption period has run. FLM's designated affidavit testifying to a continued discussion about how the foundry sand can be used in an affordable manner (*Troy Aff.* Admin. R. p. 188, ¶ 11.), and speculating about potential projects which could beneficially reuse the foundry sand (*Troy Aff.* Admin. R. p. 188 ¶10) fail to rebut the presumption of disposal or support a genuine issue of material fact.

The Court FINDS there is no genuine issue of material fact that the sand was disposed at the Property and that the Property is an open dump. Accordingly, the Court AFFIRMS the OEA Order on this issue.

(c) "Solid waste", for purposes of IC 13-26, means all putrescible and nonputrescible solid and semisolid wastes, except human excreta. The term includes garbage, rubbish, ashes, street cleanings, dead animals, offal, and solid commercial, industrial, and institutional wastes.

CONCLUSION

The Court AFFIRMS in part, REVERSES in part, and REMANDS this cause to the Office of Environmental Adjudication for proceedings consistent with this opinion.

All of the above is SO ORDERED.

_/s/ Therese A. Hannah_____
Therese A. Hannah, Commissioner
Environmental Docket

Read and Approved: _/s/ Judge Timothy W. Oakes_____
Judge Timothy W. Oakes
Marion Superior Court, Civil Division 2

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