

(b) OEA’s Findings of Fact, Conclusions of Law, and Order Denying Motion to Reconsider and to Dismiss and Motion to Dismiss, issued March 24, 2006, attached as Exhibit B (the “2006 OEA Order”).

(c) OEA’s Order Denying Motions To Reconsider issued August 28, 2008, denying IKEC’s motions filed September 26, 2006, and April 22, 2008. Exhibit C (the “2008 OEA Order”).

The OEA orders at Exhibits A, B, and C are hereinafter referred to collectively as the “OEA Orders,” and the OEA Orders are the agency action at issue in this proceeding.

2. This Verified Petition for Review is filed pursuant to IND. CODE §§ 4-21.5-5-1 *et seq.*

3. The name and mailing address of Petitioner IKEC are as follows:

Indiana-Kentucky Electric Corporation
P.O. Box 468
3932 U.S. Rt. 23
Piketon, Ohio 45661

4. The names and mailing addresses of the agencies whose action is at issue are as follows:

Indiana Department of Environmental Management (“IDEM”)
100 North Senate Avenue
Mail Code 50-01
Indianapolis, Indiana 46204-2251

Indiana Office of Environmental Adjudication
Room N501
100 North Senate Avenue
Indianapolis, Indiana 46204

5. The names and mailing addresses of the persons who were parties to the proceedings that led to the OEA Orders were:

IKEC
P.O. Box 468
3932 U.S. Rt. 23
Piketon, Ohio 45661

IDEM
100 North Senate Avenue
Mail Code 50-01
Indianapolis, Indiana 46204-2251

Citizens Action Coalition of Indiana, Inc. (“**CAC**”)
603 E. Washington Street
Suite 502
Indianapolis, Indiana 46204

Save the Valley, Inc. (“**STV**”)
3800 W. H&H Rustic Lane
P.O. Box 813
Madison, Indiana 47250

Hoosier Environmental Council, Inc. (“**HEC**”)
3951 N. Meridian Street
Suite 100
Indianapolis, Indiana 46208

STV, HEC, and CAC are hereinafter referred to collectively as the “**Citizens Groups**” or “**Groups.**”

6. IKEC qualifies for standing under IND. CODE § 4-21.5-5-3 because it is a person to whom the OEA Orders are specifically directed and because IKEC was a party to the agency proceedings that led to the OEA Orders.

7. IKEC has exhausted all administrative remedies, because the OEA Orders are part of the final agency action issued March 17, 2010, in the 2002 OEA Proceeding. The OEA orders granting partial, and eventually full, summary judgment in favor of IKEC and against Citizens Groups are collected at *Exhibit D*. They adjudged that IDEM’s issuance of the 2002 Permit and IKEC’s activities pursuant thereto have not aggrieved or adversely affected Groups’ members alleged to be aggrieved thereby in the Groups’ Amended Petition to OEA.

Exhibit D.1. OEA Order of March 23, 2007, granting IKEC partial summary judgment on procedural issues and fugitive dust claims.

Exhibit D.2. OEA Final Order of October 6, 2008, granting IKEC partial summary judgment on surface water issues, including NPDES-permitted discharges and Landfill seepage. Citizens Groups did not petition for judicial review of this Final Order and judicial review thereof is barred by the 30-day deadline in IND. CODE § 4-21.5-5-5.

Exhibit D.3(a). OEA Final order of August 24, 2009, granting IKEC partial summary judgment with respect to City of Madison water issues.

Exhibit D.3(b). Citizens Groups' unverified Petition for Judicial Review of Exhibit D.3(a) filed in this Court on or about September 23, 2009.

Exhibit D.3(c). IKEC's Motion to Dismiss Exhibit D.3(b) pursuant to Ind. Trial R. 12(B)(6) for lack of compliance with IND. CODE § 4-21.5-5-7(b) (failure to verify petition).

Exhibit D.3(d). This Court's Order of November 12, 2009, dismissing No. 49F12-0909-MI-044249 pursuant to Trial R. 12(B)(6), which operates as an adjudication on the merits and bars further review of the issues addressed in Exhibit D.3(a) under *res judicata*.

Exhibit D.4. OEA Final Order of March 17, 2010, granting IKEC summary judgment on all remaining issues in the 2002 OEA Proceeding and constituting exhaustion of administrative remedies.

8. IKEC has filed this Verified Petition for Judicial Review within thirty days after the date that the final order in the OEA Proceeding was served.

9. IKEC has requested that OEA compile and make available to IKEC the administrative record so that IKEC can file it with this Court within thirty days of the date this Verified Petition for Judicial Review is filed.

THE 2002 OEA PROCEEDING.

10. On December 11, 2002, IDEM issued a renewal of IKEC's Solid Waste Restricted Waste Type III landfill operating permit authorizing disposal of coal ash in the landfill designed, operated, and permitted for that purpose on the grounds of IKEC's Clifty Creek Generating Station in Jefferson County, Indiana. IKEC has disposed of ash at the same site without incident since 1955 and has conducted dry landfilling of ash there since 1991 pursuant to its permits from IDEM.

11. On December 26, 2002, Citizens Groups filed for OEA review of IDEM's December 11, 2002, permit renewal order, thereafter amending their petition for review on March 31, 2003. Citizens Groups' original Petition for Review and their Amended, Verified Petition for Review are at *Exhibit E* hereto. (The latter is hereinafter called the "**Amended Petition.**")

THE OEA ORDER OF JUNE 23, 2003.

12. IKEC intervened in the 2002 OEA Proceeding and moved to dismiss on the basis that Groups' original petition did not meet the requirement of IND. CODE § 4-21.5-3-7(a) (the "**Statute**") that

To qualify for review ... a person must petition for review in a writing that ...

(1) States facts demonstrating that: ...

(B) The petitioner is aggrieved or adversely affected by the order.

The Amended Petition alleges only that certain other "persons" (members of Groups) are "aggrieved or adversely affected"¹ by IDEM's permit renewal order, but does not state facts demonstrating that any of CAC, HEC, or STV is itself aggrieved or adversely affected, or that that any Group holds any legal interest in aggrievement of its members that is affected by

¹ The quoted phrase is hereinafter often shortened to "**aggrieved**," a word synonymous with "adversely affected." *Reed v. Plan Comm'n and Town Council of Munster*, 810 N.E.2d 1126, 1127-28 (Ind. Ct. App. 2004), *trans. denied*.

IDEM's permit renewal order, and so Groups did not qualify for review under the Statute's mandatory requirements.

IND. CODE § 4-21.5-1-11 defines a "**person**," for purposes of the Statute and the rest of Indiana's Administrative Orders and Procedures Act, IND. CODE §§ 4-21.5, ("**AOPA**"), as, *inter alia*, an individual, **corporation**, **association** or other entity of any character. IND. CODE § 4-21.5-1-1. The Statute, like the rest of AOPA, treats all "persons" identically in all respects pertinent to this action, making no special or separate provisions for persons who are corporations or associations.

13. On June 23, 2003, the OEA's Environmental Law Judge ("**ELJ**") issued the 2003 OEA Order at *Exhibit A* denying IKEC's motion to dismiss, which motion was filed before Groups' Amended Petition was filed.

The 2003 OEA Order did not deal with the argument that was the basis of IKEC's motion to dismiss: that Indiana appellate cases have consistently held that injury to a member of an association does not mean that the association is "aggrieved" within the meaning of the Statute or similar Indiana statutes and that the petition before OEA did not state facts demonstrating that any Citizens Group has any legal interest that is harmed by IKEC's Permit renewal order. *E.g.*, *Insurance Comm'rs of Indiana v. Mutual Medical Ins., Inc.*, 241 N.E.2d 56 (Ind. 1968) (explained in *Huffman v. Indiana Office of Env't'l Adjudication*, 811 N.E.2d 806, 810-12 (Ind. 2004)); *Robertson v. Board of Zoning Appeals, Town of Chesterton*, 699 N.E.2d 310, 315 (Ind. Ct. App. 1998); *Williams-Woodland Park Neighborhood Ass'n*, 638 N.E.2d 1295, 1298 (Ind. Ct. App. 1994); *Union Twp. Residents Ass'n v. Whitley County Redev. Comm'n*, 536 N.E.2d 1044, 1045 (Ind. Ct. App. 1989); *Medical Licensing Bd. of Indiana v. Indiana State Chiropractic Ass'n, Inc.*, 373 N.E.2d 1114 (Ind. Ct. App. 1978). *Accord*, *Bagnall v. Town of Beverly Shores*,

726 N.E.2d 782, 786 (Ind. 2000) (citing *Robertson, Williams-Woodland Park Neighborhood Ass'n*, and *Union Twp. Residents Ass'n*, as properly defining “aggrieved”); *Huffman*, 811 N.E.2d at 810 (citing p. 786 of *Bagnall* to confirm that the same definition of “aggrieved” applies under the Statute).

Instead of considering the issue raised by IKEC’s motion, the 2003 OEA Order pretended that the issue before the tribunal was “whether Indiana recognizes ‘associational standing’ pursuant to the *Hunt* doctrine...” Order at ¶ 55 (citing *Hunt v. Washington State Apple Adver. Comm’r*, 432 U.S. 333 (1977)). *Hunt* deals with standing to sue in federal court and has no bearing on eligibility for administrative review under the Statute or on whether Groups’ petition to OEA “state[s] facts demonstrating that: ...(B) the petitioner is aggrieved or adversely affected by the order” renewing IKEC’s Permit (to quote IND. CODE § 4-21.5-3-7(2)(1)(B)). Nonetheless, the 2003 OEA Order reasoned that, because an unaggrieved membership association has “standing to sue” in federal (and some state) courts on behalf of its members pursuant to the non-statutory judicial doctrine of “associational standing,” an unaggrieved membership association should qualify for *administrative* review based on alleged aggrievement of its members, because that is a good idea, without regard to whether the organization qualifies for review under the Statute. 2003 OEA Order at ¶¶ 55-71 & 73. That reasoning was contrary to law at the time of the 2003 OEA Order and remains so. *See* cases in preceding paragraph.

The Indiana Supreme Court’s decision in *Huffman v. Indiana Office of Env’tl Adjudication*, 811 N.E.2d 806, 808, 809, 812 (Ind. 2004) says expressly that “the judicial doctrine of standing” (which includes “associational standing”) “does not apply” to administrative proceedings under the Statute. *See* ¶¶ 42-56 below. Because the OEA Orders are inconsistent with these cases, they are not in accordance with law and should be vacated.

PRIOR PROCEEDINGS IN THIS COURT.

14. On July 3, 2003, IKEC petitioned this Court for interlocutory judicial review of the non-final 2003 OEA Order under IND. CODE §§ 4-21.5-5 and also sought a declaratory judgment. On July 23, 2003, IDEM petitioned for judicial review of the 2003 OEA Order. This Court consolidated IKEC's and IDEM's cases, Nos. 49F12-0307-MI-002024 and 49F12-0307-PL-002327, respectively.

On July 24, 2003, IKEC moved for partial summary judgment on its declaratory judgment claim.

15. On July 25, 2003, Citizens Groups moved under Trial Rule 12(B)(1) to dismiss IKEC's action for lack of subject matter jurisdiction on grounds that IKEC had not established (1) immediate and irreparable harm or (2) absence of an adequate remedy at law, as IND. CODE § 4-21.5-5-2(c) requires that one must establish in order to secure judicial review of non-final agency action under AOPA. (For brevity, these grounds are hereinafter usually referred to as "**failure to exhaust.**")

Groups filed no response to IKEC's Motion for Partial Summary Judgment, relying instead on the rule that a court without subject matter jurisdiction lacks authority to rule on a summary judgment motion or take any other action beyond dismissal. *Perry v. Stitzer Buick GMC, Inc.*, 637 N.E.2d 1282, 1286 (Ind. 1994); *Foshee v. Shoney's, Inc.*, 637 N.E.2d 1277, 1280 (Ind. 1994). "In Indiana, if a party is required by the Administrative Adjudication Act to exhaust its administrative remedies before an agency before obtaining judicial review of the agency decision, courts are completely ousted of subject matter jurisdiction to hear the case at all." *Austin Lakes Joint Venture v. Avon Utils., Inc.*, 648 N.E.2d 641, 644-45 & n.3 (Ind. 1995). See *Exhibits F & G* (Groups' Joint Motions to Dismiss IKEC's and IDEM's pleadings pursuant to Trial R. 12(B)(1) and Briefs in Support).

16. On August 16, 2003, Groups moved to dismiss IDEM's Petition for Judicial Review on similar grounds of failure to exhaust. Groups' motions and briefs (*Exhibit G*) did not mention associational standing, and their gist was that, because IKEC and IDEM had not qualified under IND. CODE § 4-21.5-5-2(c) and-4 for judicial review of a non-final agency order, this Court lacked subject matter jurisdiction and could not review the 2003 OEA Order (*i.e.*, could not take up the issue whether the Amended Petition to OEA stated facts demonstrating that Groups were aggrieved).

17. On October 27, 2003, this Court denied Citizens Groups' Joint Motions to Dismiss and entered partial summary judgment in IKEC's favor on its declaratory judgment claim, declaring as follows:

The Court ORDERS, ADJUDGES, AND DECLARES that an organization or membership association does not satisfy the jurisdictional standing requirement of IND. CODE § 4-21.5-3-7(a)(1)(B) by stating facts that demonstrate that its members are aggrieved or adversely affected by the order of which review is sought. In order to invoke administrative review under Indiana's Administrative Orders and Procedures Act, a petitioner seeking review under IND. CODE § 4-21.5-3-7(a)(1)(B) must petition for review in a writing that states facts demonstrating that "the petitioner is aggrieved or adversely affected by the order" of which review is sought. *Id.* Allegations by an unaffected association that members of the association (or any other persons than the petitioner itself) are aggrieved are not sufficient to invoke the tribunal's jurisdiction over the case.

(The issue addressed in this Order is sometimes hereinafter referred to as the "**Merits**," to distinguish it from the other issue decided by this Court, its own subject matter jurisdiction.) Except for the word "jurisdictional" in the second line and the last eight words, the quotation above remains a correct statement of Indiana law. **In 2006, our supreme court held that there Indiana law contains no concept of "jurisdiction over the case."** See ¶¶ 36-37 below.

18. **This Court Lacked Subject Matter Jurisdiction In *Save the Valley I*.** On November 20, 2003, this Court certified for interlocutory appeal this Court's two orders (*i.e.*, denial of Petitioners' Rule 12(B)(1) motions and entry of partial summary judgment).

Thereafter, the Court of Appeals held that this Court erred in failing to grant Citizens Groups' Rule 12(B)(1) motions to dismiss both actions in their entirety for lack of subject matter jurisdiction. *Save the Valley, Inc. v. IKEC*, 820 N.E.2d 677, 682 (Ind. Ct. App. 2005), *aff'd on reh'g*, 824 N.E.2d 776 (2005), *trans. denied* ("*Save the Valley I*"). *Save the Valley I* said that IKEC and IDEM could obtain judicial review of OEA's order of June 23, 2003, upon "comply[ing] with AOPA's procedures for seeking judicial review," 820 N.E.2d at 682, *aff'd on reh'g*, 824 N.E.2d 776 ("[T]he trial court was without subject matter jurisdiction ... the Appellees must comply with AOPA procedures for seeking judicial review."), thus holding that no judicial review of IDEM's June 23, 2003, order had yet occurred, because this Court lacked subject matter jurisdiction to conduct it.

Save the Valley I's dismissal of the two actions meant that this Court was without power to do anything except dismiss them, as explained in the most-cited case in Groups' briefs to this Court (*Exhibits F & G*) and to the Court of Appeals (*Exhibit H*), *Family & Soc. Servs. Admin. v. Legacy Healthcare*, 756 N.E.2d 567, 572 (Ind. Ct. App. 2001):

Because there was no irreparable harm and the trial court's order disrupted the administrative process, the trial court lacked subject matter jurisdiction to address the merits of New Horizon's petition. When there is a lack of subject matter jurisdiction, the court is without jurisdiction to do anything in the case except to enter an order of dismissal. *Albright v. Pyle*, 637 N.E.2d 1360, 1364 (Ind. Ct. App. 1994) (quoting *Gorman v. Northeastern REMC*, 594 N.E.2d 843, 845 (Ind. Ct. App. 1992), *opinion clarified on denial of reh'g* 597 N.E.2d 366, *trans. denied*). The trial court was without jurisdiction to grant the stay. Therefore, the stay is void and we vacate the trial court's order and dismiss.

Thus, this Court was without power "to do anything in the case except to enter an order of dismissal" and its grant of partial summary judgment on the merits was "void." That principle was the gist of Groups' Motions to Dismiss (*Exhibits F & G*), which *Save the Valley I* held this Court was required to grant.

BECAUSE THE COURT OF APPEALS' SUBJECT MATTER JURISDICTION CANNOT EXCEED THAT OF THE TRIAL COURT, THE COURT OF APPEALS' HOLDING THAT THIS COURT LACKED SUBJECT MATTER JURISDICTION TO RULE ON IKEC'S AND IDEM'S CLAIMS WAS A HOLDING THAT THE APPELLATE TRIBUNAL ALSO LACKED JURISDICTION TO DO SO.

19. The Court of Appeals' Jurisdiction Could Not Exceed That Of This Court.

In the course of requiring dismissal of both actions in their entirety, the Court of Appeals panel in *Save the Valley I* engaged in a discussion (composing most of its decision) of the exact issue this Court decided in its partial summary judgment order of October 27, 2003, quoted in part at ¶ 17 above (*i.e.*, the exact issue—the Merits—over which the Court of Appeals held that this Court lacked subject matter jurisdiction).

OEA's Orders at *Exhibits B & C* treated this discussion in *Save the Valley I* in essence as a grant of summary judgment in favor of Petitioners, thus effectively nullifying the dismissal for lack of subject matter jurisdiction. That was contrary to several rules of black letter Indiana law and thus unlawful.

20. Because this Court lacked subject matter jurisdiction to conduct judicial review of OEA's Order of June 23, 2003, (*i.e.*, lacked jurisdiction rule on the issue whether the Amended Petition to OEA met the requirements of the Statute), the Court of Appeals in *Save the Valley I* also lacked subject matter jurisdiction to decide that issue. The Indiana Supreme Court has stated the rule as follows:

If ... the lower court was without power to entertain the action and decide the questions involved, this Court is equally without power to review the correctness of its decision of such questions. Jurisdiction of the general subject matter cannot be waived, and cannot be conferred by the parties.

Board of Comm'rs of Marion County v. Jewett, 184 Ind. 63, 110 N.E. 553, 555 (Ind. 1915).

Jay v. O'Donnell, 178 Ind. 282, 98 N.E. 349, 357 (Ind. 1912), is to the same effect, as are the ten Indiana Supreme Court cases it cites for the same rule:

The judgment of the court below granting license to appellee, being unlawful and without jurisdiction, was void.

Moreover, it is settled in this state that when a tribunal has no jurisdiction of a proceeding that the court to which the same is appealed has no jurisdiction thereof. *Jolly v. Ghering*, 40 Ind. 139, 141; *Kiphart v. Brennemen*, 25 Ind. 152; *Palmer v. Fuller*, 22 Ind. 115; *Mays v. Dooley*, 59 Ind. 287, 288; *Horton v. Sawyer*, 59 Ind. 587; *Pritchard v. Bartholomew*, 45 Ind. 219; *Millisor v. Wagner*, 133 Ind. 400, 403, 32 N.E. 927; *Wilcox v. Bryant*, 156 Ind. 379, 382, 59 N.E. 1049; *Myers v. Gibson*, 152 Ind. 500, 506, 53 N.E. 646; *Steinmetz v. C. H. Hammond Co.*, 167 Ind. 153, 156, 78 N.E. 628, and cases cited.

Accord, Nolan v. Taylor, 864 N.E.2d 419, 422 (Ind. Ct. App. 2007).

There is no exception to this black letter jurisdictional principle: “[I]t is settled in this state....” So the way to determine the appellate court’s subject matter jurisdiction to decide a case is to determine whether the trial court had jurisdiction to do so. *Save the Valley I* held that this Court lacked subject matter jurisdiction over both actions, and it follows under the cases just cited that the Court of Appeals’ lack of subject matter jurisdiction was congruent, so that the appellate panel was without the power to rule on IKEC’s partial summary judgment motion, and without the power to do anything but dismiss. Anything else it purported to do was “void.” Under the cases above, OEA’s rulings that the Court of Appeals in *Save the Valley I* had subject matter jurisdiction to review the 2003 OEA Order and that that court’s associational standing discussion was not void, but law of the case, are barred by the same court’s holding that “the trial court was without subject matter jurisdiction....” 824 N.E.2d 776.

Because the 2006 and 2008 OEA Orders are contrary to these cases, they are not in accordance with law and should be vacated.

21. “When a court proceeds without jurisdiction of the subject matter, its judgment is wholly void.... A void judgment implies no judgment at all, and its nonexistence may be declared upon collateral attack, upon suggestion of an amicus curiae, or by the court at any time upon its own motion.” *Lowery v. State Life Ins. Co.*, 153 Ind. 100, 54 N.E. 442, 442-43 (1899).

“When a court lacks subject matter jurisdiction, any action it takes is void.” *Perry v. Stitzer Buick GMC, Inc.*, 637 N.E.2d 1282, 1286 (Ind. 1994). *Accord, Robertson v. State*, 903 N.E.2d 1009 (Ind. Ct. App. 2009) (“When courts lack subject matter jurisdiction, their actions are void *ab initio*, and may be attacked at any time.”); *In re Guardianship of M. E. T.*, 888 N.E.2d 197, 198 (Ind. Ct. App. 2008) (“When a court lacks subject matter jurisdiction, its actions are void *ab initio* and have no effect whatsoever.”).

Because the 2006 and 2008 OEA Orders are contrary to these cases and to the principle of *res judicata*, they are not in accordance with law and should be vacated.

22. A court without subject matter jurisdiction lacks authority to rule on a summary judgment motion. *Perry v. Stitzer Buick GMC, Inc.*, 637 N.E.2d 1282, 1286 (Ind. 1994); *Foshee v. Shoney’s, Inc.*, 637 N.E.2d 1277, 1280 (Ind. 1994); *Smith v. Gary Public Transp. Corp.*, 893 N.E.2d 1137, 1140 (Ind. Ct. App. 2008) (Barnes, J.). Therefore, the ruling on a summary judgment motion can never be the basis for dismissal for lack of subject matter jurisdiction: if subject matter jurisdiction is lacking, any ruling on a summary judgment motion is void for lack of jurisdiction. The appellate panel in *Save the Valley I* approached the case as if it were unaware of this principle, stating: “The Appellants raise three issues, which we consolidate and restate as whether the trial court properly granted IKEC’s motion for summary judgment.” 820 N.E.2d at 878.

Because the 2006 and 2008 OEA Orders are contrary to these cases, they are not in accordance with law and should be vacated.

23. When a court both dismisses for lack of subject matter jurisdiction and takes another action, dismissal takes precedence and the other action is void. *Gorman v. Northeastern REMC*, 594 N.E.2d 843 (Ind. Ct. App. 1992), *opinion clarified on denial of reh’g*,

597 N.E.2d 366 (1992), *trans. denied* (Oct. 26, 1992); *United Steelworkers of America, AFL-CIO-CLC v. Northern Indiana Public Serv. Co.*, 436 N.E.2d 826 (Ind. Ct. App. 1982); *Smith v. Gary Public Transp. Corp.*, 893 N.E.2d 1137 (Ind. Ct. App. 2008) (Barnes, J.) (holding void a grant of summary judgment in favor of the defendant, whose Trial R. 12(B)(1) motion was also granted).

Because the 2006 and 2008 OEA Orders are contrary to these cases, they are not in accordance with law and should be vacated.

24. *Save the Valley I's* grant of Groups' Trial Rule 12(B)(1) motions meant that this Court's ruling on IKEC's motion for partial summary judgment was void *ab initio*. Since an appellate court cannot acquire jurisdiction of an action over which the trial court lacks jurisdiction, *Jewett; Jay v. O'Donnell*, both *supra* at ¶ 20, the Court of Appeals in *Save the Valley I* also lacked subject matter jurisdiction to conduct judicial review of the 2003 OEA Order or to rule on this Court's partial summary judgment order (cases at ¶ 22), and the Court of Appeals' discussion of that issue (*i.e.*, its whole discussion of "associational standing") is "void for every purpose." *Lowery v. State Life Ins. Co.*, *supra*. Groups' and OEA's claims that the Court of Appeals in *Save the Valley I* had subject matter jurisdiction over the Merits of IKEC's and IDEM's claims are barred by the *res judicata* and collateral estoppel effect of the dismissal for lack of subject matter jurisdiction in *Save the Valley I*, which takes precedence.

MEANWHILE, BACK AT OEA.

25. During pendency of the proceedings in this Court, the parties continued for a while to litigate before OEA. On August 13, 2003, IKEC again moved OEA to dismiss the proceeding in light of *Huffman v. Ind. Dep't of Env'tl. Mgmt.*, 788 N.E.2d 505 (Ind. Ct. App. 2003), *reh'g denied, on transfer*, 811 N.E.2d 806 (Ind. 2004). Citizens Groups opposed this on the basis that all matters raised in IKEC's motion to OEA were subject to this Court's exclusive

jurisdiction. On August 27, 2003, OEA denied IKEC's motion, ordering, as requested and drafted by Citizens Groups, as follows:

The Environmental Law Judge ("ELJ"), having read and considered the petitions, motions, records of proceedings, evidence, and the briefs and responses of the parties, now finds the OEA has relinquished jurisdiction over the issues currently pending in the Marion Superior Court appeal, i.e. those of OEA jurisdiction and the Petitioners' [i.e., Groups'] standing. *Bradley v. State*, 649 N.E.2d 100, 106 (1995). Therefore, the ELJ refers to the Marion Superior Court on the issues which are currently under appeal and, therefore, DENIES the instant motion.

This Order is at *Exhibit I* (bracketed matter added). Thus, OEA disclaimed subject matter jurisdiction during the period July 3, 2003 (when IKEC filed in this Court) until September 6, 2005 (when this Court remanded the case to OEA).

On November 3, 2003, OEA's Chief Environmental Law Judge issued an order staying all proceedings in the case until further order of this Court, which turned out to be September 6, 2005. *Exhibit J*.

BACK TO OEA AFTER REMAND—PROCEEDINGS LEADING TO THE OEA ORDER OF MARCH 24, 2006.

26. After denial of transfer and dismissal for lack of subject matter jurisdiction in *Save the Valley I*, there was, or should have been, no judgment except dismissal, and this Court remanded the case to OEA on September 6, 2005, without notice to IKEC. On October 7, 2005, OEA ordered that dispositive motions be filed by October 14, 2005. **On that date, IKEC filed a motion to dismiss the Amended Petition for failure to meet the mandatory requirements of the Statute and failure to prosecute the OEA proceeding in the names of the real parties in interest, as required by *Huffman*, 811 N.E.2d at 814-15.** That motion, filed timely under OEA's Order of October 7, 2005, was the first Rule 12(B)(6) motion filed by IKEC after the Amended Petition was filed on March 31, 2003 (aside from the one filed in August 2003, which OEA denied for lack of subject matter jurisdiction as quoted above in ¶ 25), and was the first Rule

12(B)(6) motion IKEC could file after *Huffman* was decided by the Indiana Supreme Court on June 30, 2004, because OEA had disclaimed subject matter jurisdiction as quoted in ¶ 25 above and also stayed all proceedings in the OEA case. *Id.*

In awarding partial summary judgment to IKEC, this Court had relied on *Huffman v. Indiana Dep't of Env't'l. Mgmt.*, 788 N.E.2d 505 (Ind. Ct. App. 2003). Before IKEC's and IDEM's briefs were filed in *Save the Valley I*, the Indiana Supreme Court granted transfer in *Huffman* on November 8, 2003, 804 N.E.2d 757 (Ind. 2003) (table), which operated to vacate the decision and make it not citable. After IKEC's and IDEM's briefs were filed, our supreme court's decision in that case was published on June 30, 2004, *sub. nom. Huffman v. Indiana Office of Env't'l. Adjudication*, 811 N.E.2d 806 (Ind. 2004). Thus, IKEC and IDEM were unable to cite in their appellate briefs in *Save the Valley I* either the Court of Appeals' or the Indiana Supreme Court's decision in *Huffman*.

27. On November 4, 2005, IKEC filed a Motion to Reconsider OEA's Order of June 23, 2003, in light of *Huffman*; *Indiana Ass'n of Beverage Retailers v. Indiana Alcohol and Tobacco Comm'n*, 836 N.E.2d 255, 259 (Ind. Oct. 27, 2005) (association case under the Statute that was decided after *Save the Valley I*, after this Court's remand of the case, after OEA's scheduling order of October 7, 2005, and stating that a "person," referring in that case to an association, must suffer "direct injury" in order to be "aggrieved" under the Statute); and *Insurance Comm'rs of Indiana v. Mutual Med. Ins., Inc.*, 241 N.E.2d 56 (Ind. 1968). None of those cases had been considered in OEA's Order of June 23, 2003, and two of them postdated it. IKEC's Motion to Reconsider pointed out that *Save the Valley I* did not constitute law of the case, since the panel dismissed the case for lack of subject matter jurisdiction on grounds of failure to exhaust as required by IND. CODE §§ 4-21.5-5-2 and -4 pursuant to Citizens Groups'

motions to dismiss, and the Court of Appeals, therefore, lacked subject matter jurisdiction to decide the Merits or rule on this Court's partial summary judgment order (which was void for lack of subject matter jurisdiction).

The same motion pointed out that, having prevailed on their Trial Rule 12(B)(1) motions in *Save the Valley I*, Groups are judicially estopped to argue that the Court of Appeals had subject matter jurisdiction to conduct judicial review of the 2003 OEA Order, by deciding IKEC's motion for partial summary judgment ruled on by this Court on October 27, 2003.

THE OEA ORDER OF MARCH 24, 2006.

28. On March 24, 2006, OEA issued the 2006 OEA Order at *Exhibit B*. The 2006 OEA Order denied IKEC's October 14, 2005, Motion to Dismiss the Petition for Review and denied IKEC's November 4, 2005, Motion to Reconsider OEA's Order of June 23, 2003, In Light of New Authority and to Dismiss the Petition for Review for Lack of Jurisdiction Over the Case and Failure to Prosecute in the Names of the Real Parties in Interest.

(a) OEA ruled on March 24, 2006, that IKEC had "waived" any challenge of the Amended Petition on grounds that the Amended Petition failed to meet the requirements of the Statute or that Petitioners failed to prosecute in the names of the real parties in interest (both as elaborated in *Huffman, supra*, which was decided after OEA disclaimed subject matter jurisdiction during pendency of *Save the Valley I*). The 2006 OEA Order's waiver ruling was issued:

1. despite the provisions of Trial Rules 12(B)(6) and 12(H)(2) allowing such defenses to be made by motion at any time up to and including at trial on the merits;
2. despite OEA's Order of August 27, 2003 (made at Groups' behest), disclaiming subject matter jurisdiction and refusing to entertain any such motions beginning with IKEC's filing in this Court on July 3, 2003 and ending on September 6, 2005, when this Court remanded (a period during which *Huffman* was decided on June 30, 2004);

3. despite OEA's own scheduling order of October 7, 2005;
4. despite *Exhibit J* in which OEA stayed all proceedings pending further order of this Court;
5. despite the fact that *Indiana Ass'n of Beverage Retailers* was decided on October 27, 2005.

2006 OEA Order, at ¶¶ 107-112, *Exhibit B*.

In other words, OEA arbitrarily and unlawfully precluded IKEC from filing a Rule 12(B)(6) motion at any time after Petitioners filed their Amended Petition on March 31, 2003, or in light of our supreme court's important decisions in *Huffman* and *Indiana Ass'n of Beverage Retailers*, or pursuant to OEA's own scheduling order and stay order (*Exhibits J & K*), or pursuant to Trial Rule 12(B) or 12(H)(2).

(b) **Judicial Estoppel.** The 2006 OEA Order held that it was "essential and necessary" for the *Save the Valley I* court to decide the Merits in order to decide that it lacked subject matter jurisdiction to decide the Merits. *See Exhibit B*, ¶¶ 23 - 36. The 2006 OEA Order overlooked IKEC's argument, never opposed by Citizens Groups, that they are judicially estopped to argue that the *Save the Valley I* court possessed subject matter jurisdiction to rule on the Merits, because Groups had prevailed on their argument in the Court of Appeals that this Court (and hence the Court of Appeals) lacked subject matter jurisdiction to rule on IKEC's otherwise unopposed motion for partial summary judgment, conduct judicial review of the 2003 OEA Order, or to render declaratory judgment. *See Exhibits F, G, & H*. The doctrine of judicial estoppel prohibits a party from presenting a position contrary to one upon which it previously prevailed, as explained in *S & B Constr., LLC v. Old Fort LLC*, 826 N.E.2d 32 (Ind. Ct. App. 2005) as follows:

Judicial estoppel protects the essential integrity of the judicial process by preventing a party and its counsel from "playing fast and loose" with the courts. *GEICO ins. Co. v. Rowell*, 705 N.E.2d 476, 481 (Ind. Ct. App. 1999). A party

may not assert a position in a legal proceeding inconsistent with one previously asserted. *Am. Family Mut. Ins. Co. v. Ginther*, 803 N.E.2d 224, 234 (Ind. Ct. App. 2004).

It is the general rule that allegations or admissions in pleadings in a former action or proceeding will ordinarily estop the party making them from denying their truth in a subsequent action or proceeding in which he is a party to the prejudice of his opponent where the usual elements of estoppel by conduct are present. Also, there must have been a determination of the prior action, or, at least, the allegations or admission must have been acted on by the court in which the pleadings were filed or by the parties claiming the estoppel.

Id. at 234-35 (quoting *Tobin v. McClellan*, 225 Ind. 335, 346-47, 73 N.E.2d 679, 684 (1947)).

S & B Constr. LLC, *supra*, 826 N.E.2d at 36-37. *Accord*, *Plaza Group Properties, LLC v. Spencer County Plan Comm'n*, 911 N.E.2d 1264, No. 74A04-0901-cv-51, 2009 WL 2579349 at *4 (Ind. App. Aug. 21, 2009) (applying judicial estoppel on the basis of representations made in response to motion for summary judgment).

Save the Valley I expressly held it erroneous for this Court to deny Groups' motions to dismiss (*Exhibits F & G*), and those motions, based solely on failure to exhaust, urged that this Court was without power to decide the Merits or to do anything besides dismiss IKEC's and IDEM's actions. Citizen Groups cannot now be heard to argue that the appellate tribunal in *Save the Valley I* had the power to decide the Merits, since that is a position opposite to the one on which they prevailed in *Save the Valley I*.

IKEC raised this issue before OEA in its motion and briefs filed November 4, 2005 (*see* ¶ 26 above), and in its reply brief filed January 3, 2006. Groups did not oppose or refute the point, and so they waived it. *State v. Langen*, 708 N.E.2d 617, 621-22 (Ind. Ct. App. 1999); *City of Beech Grove v. Schmith*, 329 N.E.2d 605, 612 (Ind. Ct. App. 1975); *In re Gilbert*, 144 N.E. 551, 552 (Ind. Ct. App. 1924). OEA failed to rule on the point in the 2006 OEA Order. That failure was arbitrary, capricious, unreasonable, an abuse of any discretion involved, and not in

accordance with law, requiring that the March 24, 2006, be set aside. IND. CODE §§ 4-21.5-5-14(d), -15.

IKEC, having lost on the issue of subject matter jurisdiction, cannot be so estopped. One cannot be estopped from challenging subject matter jurisdiction, since the court is required to consider the issue even if no party raises it. *Lowery v. State Life Ins. Co.*, 54 N.E. 442, 442-43 (Ind. 1899). The parties cannot confer subject matter jurisdiction on the court, *Board of Comm'rs of Marion County v. Jewett*, *supra*, 110 N.E.2d at 555, and cannot create jurisdiction by consent. *Lowery*, 54 N.E. at 443. Although the court's lack of subject matter jurisdiction cannot be waived, its presence can be waived. *Greenbriar Hills, Inc. v. Boes*, 473 N.E.2d 1040, 1042 (Ind. Ct. App. 1985).

Moreover, while unlawfully ignoring IKEC's unopposed judicial estoppel arguments, OEA adopted *verbatim* Groups' tendered proposed findings of fact and conclusions of law, renumbered them somewhat, and turned them into the 2006 OEA Order. The 2006 OEA Order is just the opposite of Groups' jurisdictional arguments (*Exhibits F, G, & H*) accepted by the Court of Appeals in *Save the Valley I*.

29. For these reasons and those below, the 2006 OEA Order was arbitrary, capricious, not in accordance with law, and without observance of procedure required by law and should be set aside. IND. CODE § 4-21.5-5-14.

THE 2006 OEA ORDER ERRONEOUSLY TREATED THE VOID PORTION OF SAVE THE VALLEY I AS BINDING LAW OF THE CASE AND FAILED TO ACCORD PRECEDENCE TO THE COURT OF APPEALS' DISMISSAL OF THE CASE. THIS WAS CONTRARY TO LAW.

30. Paragraph 23 of the 2006 OEA Order admits that *Save the Valley I* held that this Court lacked subject matter jurisdiction over the actions filed by IKEC and IDEM. However, the 2006 OEA Order proceeds to launch a collateral attack on *Save the Valley I's* dismissal order. The 2006 OEA Order holds in effect that no dismissal occurred and that the Court of

Appeals had subject matter jurisdiction to conduct judicial review of the 2003 OEA Order, did so, and in effect granted summary judgment in favor of Citizen Groups. That treatment of *Save the Valley I* is in conflict with all the jurisdictional principles and cases set out above in ¶¶ 18-24, as shown below.

31. The 2006 OEA Order relies entirely on this passage from *Save the Valley I*:

Finally, based on our conclusion that the Appellants had standing to seek administrative review, we must also conclude that the trial court improperly denied their motion to dismiss IKEC’s petition for judicial review and complaint for declaratory judgment. Because the Appellants had standing, the OEA had jurisdiction over the case, requiring the Appellees to comply with the AOPA procedures for seeking judicial review.

Conclusion

The trial court improperly granted IKEC’s motion for partial summary judgment and also improperly denied the Appellants’ motions to dismiss. We reverse.

Reversed.

820 N.E.2d at 672.

The 2006 OEA Order unlawfully holds that a reviewing court is ousted of subject matter jurisdiction under Chapter 5 of AOPA in cases where the petitioners before the agency “had standing to seek administrative review,” saying it was “essential and necessary” for the Court of Appeals to decide the “critical issues of law that [Petitioners] can rely on the doctrine of associational standing and thus that OEA has jurisdiction over the case” in order to decide “that the trial court improperly denied [Groups] motion to dismiss for lack of jurisdiction.” 2006 OEA Order at ¶ 30.

The 2006 OEA Order cites no logic and no authority for this proposition, which is indefensible, arbitrary and capricious, and contrary to law. It fails to accord the required legal effect to *Save the Valley I*’s holding that it was error for this Court to deny Groups’ Trial R. 12(B)(1) motions to dismiss (“[W]e must also conclude that the trial court improperly denied

their motion to dismiss IKEC’s petition for judicial review and complaint for declaratory judgment.”). The 2006 OEA Order disregards the obvious facts that the only possible basis for *Save the Valley I’s* requiring dismissal of both IKEC’s and IDEM’s actions in their entirety was that set forth in Groups’ Trial Rule 12(B)(1) motions which the Court of Appeals required that this Court grant—failure of IKEC and IDEM to qualify for review of a non-final agency order under IND. CODE § 4-21.5-5-2—and that neither Groups’ standing (or lack of it) before OEA nor OEA’s “jurisdiction over the case” (or lack of it) had any possible bearing on whether IKEC or IDEM qualified for judicial review of a non-final agency order under IND. CODE § 4-21.5-5-2(c).

Citizen Groups’ Rule 12(B)(1) motions were to the effect that IKEC’s and IDEM’s failure to qualify for judicial review under IND. CODE § 4-21.5-5-4 (no subject matter jurisdiction to review non-final action prior to exhaustion of administrative remedies) or § -2(c) (no subject matter jurisdiction to review non-final agency order except upon showing or irreparable harm and lack of an adequate remedy of law) deprived this Court of subject matter jurisdiction, which meant that this Court could not proceed to rule on IKEC’s motion for partial summary judgment. Those statutes are self-executing and oust a court of subject matter jurisdiction under AOPA Chapter 5 without regard to (a) whether the petitioner before the agency had standing, (b) whether the petitioner had associational standing, or (c) whether the agency had “jurisdiction over the case.” In fact, the Court of Appeals and OEA had it backwards. Unless the petitioner for judicial review qualifies under one of the two statutes just cited, the court lacks subject matter jurisdiction and is without the power to decide (a), (b), or (c). *See Austin Lakes Joint Venture v. Avon Utils., Inc.*, 648 N.E.2d 641, 644-45 & n.3 (Ind. 1995).

Austin Lakes makes clear that *Save the Valley I’s* dismissal for lack of subject matter jurisdiction meant that the courts were “without the power” to determine whether the 2003 OEA

Order was lawful, because that determination constitutes judicial review under AOPA, IND. CODE § 4-21.5-5-14(d), and OEA must have both the opportunity to make the first decision on the issue and “to correct its own errors,” *id.* at 644, before judicial review can occur. IND. CODE § 4-21.5-5-2(c) & -4. *Accord, Town Bd. of Orland v. Greenfield Mills, Inc.*, 663 N.E.2d 523, 525 (Ind. 1996).

The *Save the Valley I* courts were “completely ousted of subject matter jurisdiction to hear the case at all,” *Austin Lakes*, 648 N.E.2d at 644, by virtue of IKEC’s and IDEM’s failure “to comply with the AOPA procedures for seeking judicial review,” 820 N.E.2d at 682; *aff’d on reh’g*, 824 N.E.2d 776, *i.e.*, for failure to exhaust. That failure to exhaust was the basis for *Save the Valley I*’s dismissal of the cases, and anything beyond that is not essential to the dismissal and is void. *See Perry v. Stitzer Buick GMC, Inc.*, *supra*; *State ex rel. Dunkleberg v. Porter*, 134 Ind. 63, 33 N.E. 687 (1893).

32. *Save the Valley I*’s holding that this Court erroneously denied Citizen Groups’ Trial R. 12(B)(1) motions meant that this Court lacked any authority to rule on IKEC’s motion for partial summary judgment, *Perry v. Stitzer Buick GMC, Inc.*, 637 N.E.2d 1282, 1286 (Ind. 1994) (a court without subject matter jurisdiction lacks authority to rule on a summary judgment motion); *Smith v. Gary Public Transp. Corp.*, 893 N.E.2d 1137, 1140 (Ind. Ct. App. 2008), and that this Court’s ruling on that motion was “void.” *Perry*, *supra*, 637 N.E.2d at 1286.

33. Since *Save the Valley I* held that this Court lacked subject matter jurisdiction over IKEC’s and IDEM’s actions and therefore lacked authority to rule on IKEC’s motion for partial summary judgment, the Court of Appeals in *Save the Valley I* was likewise without authority to rule on IKEC’s motion for partial summary judgment, and its discussion thereof was likewise

void. When the trial court has no jurisdiction of an action, the court to which its judgment is appealed is likewise without subject matter jurisdiction. *Board of Comm'rs of Marion County v. Jewett*, 110 N.E. 553, 555 (Ind. 1915); *Jay v. O'Donnell*, 98 N.E. 349, 357 (Ind. 1912); *Nolan v. Taylor*, 864 N.E.2d 419, 422 (Ind. Ct. App. 2007). See ¶ 21.

34. Because the Court of Appeals in *Save the Valley I* held that it lacked subject matter jurisdiction over the actions brought by IKEC and IDEM, and therefore could not address any issue beyond jurisdiction, the remainder of the decision (*i.e.*, the panel's whole discussion of this Court's ruling on the Merits) was "void to every intent, and for every purpose." *Lowery v. State Life Ins. Co., Inc.*, 54 N.E.2d 442, 443 (Ind. 1899). See *In re Guardianship of M.E.T.*, 888 N.E.2d 197, 198 (Ind. Ct. App. 2008) ("When a court lacks subject matter jurisdiction, its actions are void *ab initio* and have no effect whatsoever"). That trumps law of the case doctrine.

Accordingly, the 2006 OEA Order's opposite ruling—that the same discussion is "binding" (*Exh. B* heading atop p. 4) and "law of the case" (*id.* at ¶¶ 18-20, 24, 37-46)—is arbitrary, capricious, and not in accordance with law.

35. A court's subject matter jurisdiction under AOPA Chapter 5 to review agency action depends in no way upon whether the petitioner before the agency has or had "standing," has or had "associational standing" is or was "aggrieved," or upon whether the agency had or lacked "jurisdiction over the case." Therefore, the 2006 OEA Order's conclusion of law that it was "essential and necessary" for *Save the Valley I* to address those issues was arbitrary, capricious, and otherwise not in accordance with law.

(a) **There is no statute and no reported case ousting a court of AOPA Chapter 5 review jurisdiction on the basis that the petitioner had or lacked standing before**

the agency. Similarly, there is no statute and no reported case ousting a court of review jurisdiction under AOPA Chapter 5 because such a petitioner had or lacked associational standing. *Save the Valley I* in fact cited two cases showing just the opposite.

In *FDL v. Steuben County Waste Watchers, Inc.*, 749 N.E.2d 1243, 1255 (Ind. Ct. App. 2001), the court conducted detailed judicial review (*i.e.*, exercised jurisdiction) of OEA's Order *after* concluding that FDL had waived any challenge to the Waste Watchers' standing before OEA so that the organization was deemed to have standing. *Save the Valley I* cited the case for that exact point. 820 N.E.2d at 679 & n.4.

Huffman was a case on virtually all fours with this one. There a third party petitioner, *i.e.*, a "person" (like Groups here) sought OEA review of IDEM's order renewing Lilly's permit. As here, the permittee sought dismissal on the basis that the petition to OEA did not show that the petitioner, Ms. Huffman, was aggrieved (although Lilly, OEA, and this Court erroneously equated being "aggrieved" with having "standing to sue," as did the OEA Orders in this case). *Huffman* observed that OEA's jurisdiction was not implicated by that challenge:

IDEM [*i.e.*, OEA] always has jurisdiction over such challenges and that does not change depending upon the petitioner.

Huffman, 811 N.E.2d at 814-15 (bracketed matter added).

Huffman went on to rule that, taking the allegations of the petition as true, as required by Trial R. 12(B)(6), "Dismissing this claim was premature." *Id.* at 815 (referring to the allegation in Ms. Huffman's petition that she was aggrieved by possible personal injury from Lilly's permitted discharges). Thus, as in *Save the Valley I*, the petition before OEA was held to have sufficiently alleged grievance to survive a motion to dismiss. But that ruling was made "on the merits" in the course of judicial review of OEA's dismissal order and did not oust the court of subject matter jurisdiction.

Thus, in both *FDL* and *Huffman*, the third-party petitioner challenging an IDEM-issued permit before OEA was deemed to have adequately stated that it or she was “aggrieved” (had “standing”), and both courts nonetheless exercised subject matter jurisdiction. Those cases are jurisdictionally distinguished from *Save the Valley I only* in that the petitioners for judicial review in each of those two cases had exhausted administrative remedies.

So the only basis for *Save the Valley I*’s holding that this Court was without subject matter jurisdiction was that IKEC and IDEM had failed to qualify for judicial review under IND. CODE § 4-21.5-5-4 and -2(c). That was the same and only basis set out in Citizen Groups’ Rule 12(B)(1) motions that *Save the Valley I* expressly required this Court to grant. Thus, it was not “essential and necessary” for the *Save the Valley I* panel to decide the Merits, in order for it to decide that this Court (and therefore the Court of Appeals, *Jewett; Jay v. O’Donnell*) lacked subject matter jurisdiction (to decide the Merits). The sole and sufficient basis for dismissal was failure of IKEC and IDEM exhaust administrative remedies or to qualify for review of non-final agency action under IND. CODE § 4-21.5-5-2(c). Any action beyond that determination was in excess of the court’s subject matter jurisdiction and therefore void.

(b) **As set forth in ¶¶ 36-37, there is no concept of “jurisdiction over the case” in Indiana law, the Indiana Supreme Court having “abolished” it with retroactive effect in *K.S. v. State*, 849 N.E.2d 538 (Ind. 2006), as confirmed in *Packard v. Shoopman*, 852 N.E.2d 927 (Ind. 2006).** That alone defeats any argument that it was “essential and necessary” to decide whether OEA had “jurisdiction over the case” in order to decide whether the *Save the Valley I* courts had or lacked subject matter jurisdiction. Any such argument was wrong anyway, as shown by the observation in *Huffman*, quoted above in subparagraph (a), that OEA “always

has jurisdiction over” challenges to IDEM-issued permits, no matter who the petitioner is, and as shown by the *Huffman* court’s concomitant exercise of subject matter jurisdiction.

Huffman and *FDL* both show that a court’s deciding whether a petition to OEA states facts demonstrating that the petitioner is “aggrieved” (or shows that the petitioner to OEA has “standing”) has nothing to do with whether the court *possesses* subject matter jurisdiction under AOPA Chapter 5, but *constitutes exercise* of such jurisdiction.

(c) **Indiana appellate cases hold that when an agency *arguably* possesses, or has asserted, jurisdiction over a matter (as OEA did in *Save the Valley I*), the courts lack subject matter jurisdiction to decide whether the agency *in fact* possesses such jurisdiction until administrative remedies have been exhausted.** See, e.g., *Johnson v. Celebration Fireworks, Inc.*, 829 N.E.2d 979 (Ind. 2005); *M-Plan, Inc. v. Indiana Comprehensive Health Ins. Ass’n*, 809 N.E.2d 834 (Ind. 2004); *Town Bd. of Orland v. Greenfield Mills, Inc.*, 663 N.E.2d 523 (Ind. 1996); *State ex rel. Paynter v. Marion County Sup. Ct., Room No. 5*, 344 N.E.2d 846 (Ind. 1976); *Sun Life Assurance Co. of Canada v. Indiana Comprehensive Health Ins. Ass’n*, 827 N.E.2d 1206 (Ind. Ct. App. 2005), *trans. denied*; *Indiana Family & Soc. Servs. Admin. v. Legacy Healthcare*, 756 N.E.2d 567 (Ind. Ct. App. 2001); *Save the Valley, Inc. v. Indiana Dep’t of Env’tl Mgmt.*, 724 N.E.2d 665 (Ind. Ct. App. 2000), *reh’g denied, trans. denied*; *Scales v. State*, 563 N.E.2d 664 (Ind. Ct. App. 1990); *Indiana Civil Rights Comm’n v. Meridian Hills Country Club, Inc.*, 357 N.E.2d 5 (Ind. Ct. App. 1976).

Dismissal for lack of subject matter jurisdiction was upheld or required in each of the cases just cited on grounds of failure to exhaust, and in none of such cases did the court address the “standing” of any party before the agency, whether any party had “associational standing,” or the agency’s “jurisdiction over the case.”

Thus, it is not “essential and necessary” for the court to decide whether the *agency* possesses jurisdiction in order for the court to decide whether the *court* has subject matter jurisdiction. Just the opposite: it is necessary for the *court* to have subject matter jurisdiction under AOPA Chapter 5 in order for the court to decide whether the *agency* has jurisdiction and in order for the court to decide whether the agency has exercised that jurisdiction in accordance with law. *See* IND. CODE § 4-21.5-5-14(d)(3). As all the cases above held, and as *Save the Valley I* held, the court is without subject matter jurisdiction to address those issues prior to the petitioner’s having exhausted administrative remedies or having qualified for review of a non-final agency action under IND. CODE § 4-21.5-5-2(c).

The 2006 OEA Order’s premise—that it was “essential and necessary” for the Court of Appeals in *Save the Valley I* to rule on this Court’s partial summary judgment order in order to determine the appellate court’s jurisdiction (which was nowhere addressed)—unlawfully deprives of any meaning the court’s dismissal for lack of subject matter jurisdiction and amounts to a holding that the Court of Appeals did not dismiss, but instead granted summary judgment in favor of Petitioners. But the Court of Appeals ruled expressly on rehearing that “the trial court was without subject matter jurisdiction....” 824 N.E.2d 776. That holding of dismissal “takes precedence” and renders void anything else the court purported to do. *See* cases at ¶ 23 above.

For that reason, the 2006 and 2008 OEA Orders are not in accordance with law.

(d) **A dismissal for lack of subject matter jurisdiction is without prejudice**, decides no issue on the merits, has no *res judicata* or other preclusive effect with respect to the merits (here, whether the Amended Petition states facts demonstrating that Petitioners are aggrieved or adversely affected by IDEM’s order), and “serves simply to hold the matter in abatement such that the plaintiff may avail herself of any existing remedies.” *Foshee v.*

Shoney's, Inc., 637 N.E.2d 1277, 1280 (Ind. 1994); *Perry v. Stitzer Buick GMC, Inc.*, 637 N.E.2d 1282, 1286 (Ind. 1994); *Pompey v. Pryner*, 668 N.E.2d 1243, 1248-49 (Ind. Ct. App. 1996); *Albright v. Pyle*, 637 N.E.2d 1360, 1363-64 (Ind. Ct. App. 1994); *Colvin v. Bowen*, 399 N.E.2d 835, 838 (Ind. Ct. App. 1980).

The 2006 and 2008 OEA Orders violate this principle by treating *Save the Valley I* as if dismissal for lack of subject matter jurisdiction did not occur, although it did occur, but as if summary judgment were rendered against IKEC and IDEM, which did not occur. Accordingly, those Orders are not in accordance with law and should be set aside.

For these reasons, the 2006 OEA Order's reliance on *Save the Valley I*'s discussion of associational standing and "jurisdiction over the case" were immaterial to this Court's subject matter jurisdiction and beyond the Court of Appeals' subject matter jurisdiction. Because the Court of Appeals ruled in *Save the Valley I* that this Court should have dismissed both cases pursuant to Groups' Rule 12(B)(1) motions for failure to exhaust, this Court's ruling on IKEC's motion for partial summary judgment was void *ab initio* and of no effect whatsoever. So was the Court of Appeals' discussion of this Court's partial summary judgment order, according to *Jewett; Jay v. O'Donnell; Nolan v. Taylor; Perry v. Stitzer Buick GMC; Foshee v. Shoney's*, all *supra*. That renders the 2006 and 2008 OEA Orders not in accordance with law and so they should be vacated.

OUR SUPREME COURT ABOLISHED THE CONCEPT OF JURISDICTION OVER THE PARTICULAR CASE WITH RETROACTIVE EFFECT.

36. On June 26, 2006, the decision in *K.S. v. State*, 849 N.E.2d 538 (Ind. 2006), abolished the concept of "jurisdiction over the particular case" or "jurisdiction over the case," as confirmed in *Packard v. Shoopman*, 852 N.E.2d 927 (Ind. 2006). Those cases explain that a simple legal error, like failing to state facts, in the petition to OEA, that demonstrate that the

petitioner is aggrieved, has nothing to do with jurisdiction, personal or subject matter. The abolished concept of “jurisdiction over the case” was central to *Save the Valley I*’s associational standing discussion, 820 N.E.2d at 682; 824 N.E.2d at 776, and heavily relied upon in OEA’s Order of March 24, 2006, *Exhibit B*. See *id.* at ¶¶ 16, 30, 33, 34-36.

On September 26, 2006, IKEC moved for reconsideration of OEA’s Orders of June 23, 2003, and March 24, 2006, in light of *K.S.* and *Packard*. (Motion at *Exhibit L*.) IKEC’s Motion at *Exhibit L* also pointed out that OEA had never ruled on the judicial estoppel issue described in ¶ 28(b) above.

37. On November 2, 2006, IKEC filed a Citation of Additional Authority pointing out, with respect to *K.S.* and *Packard*, that a tribunal is required to apply the law in effect at the time of its decision, which necessitates considering OEA’s Orders of June 23, 2003, and March 24, 2006, and *Save the Valley I*, as if the concept of jurisdiction over the particular case were not present in the law at the time those decisions were made. See *Don Medow Motors, Inc. v. Grauman*, 446 N.E.2d 651, 654-55 (Ind. Ct. App. 1983), *reh’g denied*. Giving retrospective effect to the abolition of the concept of jurisdiction over the case, as required by *Don Medow Motors* and the Indiana Supreme Court cases cited therein, deprives *Save the Valley I* of any law-of-the-case effect. Indeed *Huffman* had already held, prior to *Save the Valley I*, foreshadowing *K.S.* and *Packard*, that OEA’s jurisdiction is unaffected by who the petitioner is. 811 N.E. 2d at 813-14. Thus, it was not “necessary” for *Save the Valley I* to consider whether their Amended Petition to OEA stated facts demonstrating that Citizen Groups were aggrieved by IDEM’s permit renewal order in order to determine this Court’s or the Court of Appeals’ subject matter jurisdiction. *Huffman* shows that consideration of that issue constitutes exercise of subject matter jurisdiction under AOPA Chapter 5, and IND. CODE

§ 4-21.5-5-2(c) provides that such subject matter jurisdiction for judicial review of a non-final agency order cannot be had unless the petitioner for judicial review establishes both irreparable harm and absence of an adequate remedy at law. The *Save the Valley I* panel granted Petitioners' Trial Rule 12(B)(1) motions, which were made on the basis that IKEC and IDEM failed to establish these prerequisites.

38. Because it was unnecessary to decide whether Petitioners had "standing" before OEA in order to decide that the court lacked subject matter jurisdiction, *Save the Valley I's* discussion of this Court's partial summary judgment order and of "associational standing" was outside the court's subject matter jurisdiction, was therefore void, and cannot be law of the case.

39. Because the 2006 OEA Order (*Exhibit B*) treated as law of the case that portion of *Save the Valley I* that is void as in excess of the court's subject matter jurisdiction, that Order is arbitrary, capricious, and not in accordance with law. Because an appellate court cannot acquire subject matter jurisdiction over a case where the trial court lacks subject matter jurisdiction, *Save the Valley I's* discussion of Merits (whether the Amended Petition stated facts demonstrating that Citizen Groups were aggrieved) was outside the Court of Appeals' subject matter jurisdiction and void. *Board of Comm'rs v. Jewett*, 110 N.E. at 555; *Jay v. O'Donnell*, 98 N.E. at 357. Because a court without subject matter jurisdiction cannot rule on a motion for summary judgment, *Save the Valley I's* discussion of this Court's grant of partial summary judgment to IKEC was in excess of the Court of Appeals subject matter jurisdiction and void. *Perry v. Stitzer Buick GMC*, 637 N.E.2d at 1286; *Foshee v. Shoney's*, 637 N.E.2d at 1280; *Smith v. Gary Transp. Corp.*, 893 N.E.2d at 1140. For these reasons, the 2006 and 2008 OEA Orders are not in accordance with law and should be vacated.

THE 2008 OEA ORDER.

40. On August 28, 2008, OEA denied IKEC’s Motion of September 26, 2006 (*see* ¶¶ 36-37), without explanation and still without addressing the judicial estoppel issue and without addressing at all our supreme court’s critical decisions in *K.S. v. State* and *Packard v. Shoopman*, both *supra* at ¶ 36 hereof, which completely undercut OEA’s ruling (¶ 36, *Ex. B*) that it was “essential and necessary” for *Save the Valley I* to decide the non-existent issue of OEA’s “jurisdiction over the case.” *See Exhibit C*. The 2008 OEA Order was arbitrary, capricious, and not in accordance with law. The rulings in the 2006 OEA Order and the 2008 OEA Orders were not in accordance with law and should be set aside.

41. Although a dismissal for lack of subject matter jurisdiction does not bar a second action as a matter of claim preclusion, it does preclude relitigation of the precise issues that the court necessarily determined in ruling on its own jurisdiction. *Wright v. Miller*, 18A Fed. Prac. & Proc. Juris. 2d § 4436 (2005). An example of this principle is *State ex rel. Dunkleberg v. Porter*, 134 Ind. 63, 33 N.E. 687 (1893), which, in its entirety, is as follows:

Counsel in their petition for rehearing refer to the case of *Winfield Tp. v. Wise*, 73 Ind. 71, which was cited in original briefs, and contend that the decision in that case is directly in conflict with the opinion in this case, and that we ought to have followed it or overruled it. That case was dismissed by this court for want of jurisdiction, hence the case was never before this court for the decision of any question involved in it, except the question relating to the jurisdiction of this court; and what was said in relation to other questions was a mere dictum, and not an adjudication on any question.

Petition for rehearing overruled.

In a dismissal for lack of subject matter jurisdiction, the only adjudication that occurs—the only thing that can be law of the case—is “the question relating to the jurisdiction of this court.” OEA thus erred in giving law-of-the-case effect to *Save the Valley I*’s consideration of the separate issue of OEA’s jurisdiction. 2006 OEA Order, at ¶¶ 23, 24, 27, 30, 34-36, 38, 40,

43-46, 50, 53, 85, 95, 101, 114, and 116. (In the *Indiana Farm Gas* cases there cited by OEA in ¶¶ 23-24, the court did not lack subject matter jurisdiction, which renders them irrelevant here and irrelevant to the issue OEA was purporting to address—except for the point that the reviewing court was not ousted of jurisdiction by the agency’s possession of jurisdiction.) The adequacy of the Amended Petition under the Statute was exactly the issue over which *Save the Valley I* held this Court (and therefore the Court of Appeals) to be without subject matter jurisdiction.

PETITIONERS DID NOT QUALIFY FOR REVIEW UNDER THE STATUTE BECAUSE THEIR AMENDED PETITION DOES NOT STATE FACTS DEMONSTRATING THAT THEY ARE AGGRIEVED OR ADVERSELY AFFECTED BY IDEM’S ORDER OF DECEMBER 11, 2002. THE CONTRARY RULINGS IN THE THREE OEA ORDERS ARE UNLAWFUL AND CONTRARY TO EVERY REPORTED INDIANA CASE.

42. Like this case, *Huffman* arose in OEA and this Court and presented the issues (1) whether a “person’s” petition to OEA stated facts demonstrating that the “person” was “aggrieved” by an IDEM permit renewal order and (2) whether the rules for determining whether the “person” has standing to file a lawsuit (*i.e.*, the judicial doctrine of standing) determine whether a “person” is “aggrieved” within the meaning of the Statute. In *Huffman* our supreme court said this:

We hold ... that whether a person is entitled to seek administrative review depends upon whether the person is “aggrieved or adversely affected” (as provided in statute) by the administrative agency’s decision and that the rules for determining whether the person has “standing” to file a lawsuit do not apply.

811 N.E.2d at 808. The 2003 OEA Order is based entirely upon the standing-to-sue rules that *Huffman* says “do not apply” and so it is not in accord with law.

Huffman continued:

[W]hether Huffman is the proper person to file a lawsuit is **not** at issue in this case. Rather, the question is whether Huffman is the proper person to invoke the OEA power of administrative review of IDEM’s permit renewal decision. Subject to constitutional constraints, of which none are asserted here, the

Legislature may dictate access to administrative review on terms the same as or more or less generous than access to file a lawsuit. We therefore find imposition of the “judicial doctrine of standing” inappropriate here because AOPA itself identifies who may pursue an administrative proceeding.

Id., at 809 (emphasis added). The 2003 OEA Order is based entirely on the “inappropriate” judicial doctrine of standing and so it is not in accordance with law and should be set aside. *See, id.*, at ¶¶ 55-73. The cases on which the 2003 OEA Order is based arise under the judicial doctrine of standing or under statutory schemes different from the Statute, and so they are inapposite to this case. Whether Groups or their members had standing to sue “is not at issue in this case,” according to *Huffman*.

Huffman also said:

[T]he definition of “aggrieved or adversely affected” requires harm to a pecuniary, property, or personal interest.... [T]he concept of “aggrieved” is more than a feeling of concern or disagreement with a policy; rather, it is a personalized harm.

In any event, AOPA defines who can get administrative review. When a statute is clear, we do not impose other constructions upon it.

* * *

[T]he judicial doctrine of standing does not apply to administrative proceedings....

Id., at 812.

We hold that the statute, and only the statute, defines the class of persons who can seek administrative review of agency action.

Id., at 813.

Huffman, 811 N.E.2d 806, 810, also cited *Bagnall*, 726 N.E.2d 782, 786, *supra*, as defining “aggrieved” for purposes of the Statute. That page of *Bagnall* cites three association cases, each of which holds that an association is not “aggrieved” and does not acquire “standing to sue” by virtue of injury to its members. Those three are *Robertson v. Board of Zoning Appeals, Town of Chesterton*, 699 N.E.2d 310, 315 (Ind. Ct. App. 1998); *Williams-Woodland*

Park Neighborhood Ass'n v. Board of Zoning Appeals, 638 N.E.2d 1295, 1298 (Ind. Ct. App. 1994); *Union Twp. Residents Ass'n v. Whitley County Redevelopment Comm'n*, 536 N.E.2d 1044 (Ind. Ct. App. 1989) (hereinafter “*The Three Association Cases*”).

The Statute requires that “the petitioner,” not someone else, be “aggrieved or adversely affected.” The Statute does not say anything about “members,” but treats each “person” exactly the same. That is, associations and corporations must meet exactly the same requirements as individuals or other “persons” in order “[t]o qualify for review” under the “[S]tatute, and the [S]tatute alone.” IND. CODE § 4-21.5-1-1 & -11 define a corporation or association as a “person” for all purposes under AOPA and the Statute.

Huffman’s phrase “the [S]tatute, and only the [S]tatute,” when read in the context of the case, means that it is unlawful to replace the terms of the Statute with judge-made judicial-doctrine-of-standing rules such as those concerning “associational standing.” The phrase also means that it is unlawful to modify or augment the words of the Statute with judicial standing-to-sue rules such as those concerning “associational standing.”

Having associational standing to sue does not mean that an association is “aggrieved.” It normally means that the association is **not** aggrieved: “Essentially, to be ‘aggrieved or adversely affected,’ a person must have suffered or be likely to suffer in the immediate future harm to a legal interest, be it a pecuniary, property, or personal interest.” *Huffman*, 811 N.E.2d at 810. By contrast, “The modern doctrine of associational standing, under which an organization may sue to redress its members’ injuries, **even without a showing of injury to itself**, emerges from a trilogy of cases.” *United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 553 (1996) (citing *Hunt, supra*; emphasis added). Thus having associational standing to sue does not mean that a person is “aggrieved” within the meaning of the Statute.

Associational standing is judicial construct allowing an *unaggrieved* organization to file lawsuits on behalf of its aggrieved members and is thus antithetical to the words of the Statute. In *Save the Valley I*, the Court of Appeals acknowledged that there is no support in either the Statute or *Huffman* for the associational standing theory relied upon in the three OEA Orders to be reviewed here: “The statute and *Huffman* are silent regarding an association’s standing to sue on behalf of its members.” 820 N.E.2d 677, 679.

Moreover, associational standing is a “common law doctrine” developed by the courts (“emerges from a trilogy of cases,” *United Food, supra*) and thus is a facet of the “judicial doctrine of standing,” which *Huffman* held to be “inappropriate here because AOPA itself identifies who may pursue an administrative proceeding.” *Huffman*, 811 N.E.2d at 809. Thus, the law of Indiana is that the agencies and courts may not resort to the judicial doctrine of standing, including its associational standing component, to determine whether a person’s petition for administrative review under AOPA meets the requirements of the Statute.

The 2003 OEA Order at ¶ 65 says that “one need not show direct injury ... in order to qualify for administrative review under AOPA.” However, the Indiana Court of Appeals case it cites for that (*Huffman*) was vacated, 804 N.E.2d 757, and later directly contradicted by *Indiana Ass’n of Beverage Retailers, Inc. v. Indiana Alcohol and Tax Comm’n*, 836 N.E.2d 255, 259 (Ind. 2005), which states: “[A] person must show direct injury to become a ‘party’ to an administrative proceeding.” That was an association case arising under the Statute, and so it is directly on point here. The Amended Petition shows no “direct injury” to any Group.

A court is required to apply the law in effect at the time of its decision. *See Don Meadow Motors, Inc. v. Grauman*, 446 N.E.2d 651, 654-55 (Ind. Ct. App. 1983), *reh’g denied*.

For these reasons, the 2003 OEA Order, is arbitrary, capricious, and otherwise not in accordance with law and should be set aside; this Court should compel OEA to grant IKEC's motion to dismiss. IND. CODE §§ 4-21.5-5-14 & -15.

43. Each of CAC, HEC, and STV is a "corporation" and each is a "person" within the meaning of IND. CODE § 4-21.5-1-11 and therefore within the meaning of the Statute, which is defined and quoted in paragraph 12 above. Each of CAC, HEC, and STV is a "petitioner" within the meaning of the Statute.

44. Each of the individual members of CAC, HEC, and STV identified in Citizen Groups' Amended Petition to OEA (*Exhibit E*) is a "person" within the meaning of the Statute.

45. None of the individual members of CAC, HEC, and STV named in the Amended Petition to OEA is a "petitioner" or "the petitioner," referred to in subsections (a)(1)(A), (B), and -(C) of the Statute. None of such members is a "party" to the OEA proceeding. IND. CODE § 4-21.5-1-10.

46. None of the individual members of CAC, HEC, and STV identified in the Amended Petition to OEA filed a petition for review under the Statute within the 15-day deadline in IND. CODE § 4-21.5-3-7(a)(3) (A), and so they did not "qualify for review" under the Statute. The Statute requires that "To qualify for review of any other order ..., a person must petition for review in a writing ..."

47. The Statute contains no separate or different provision for corporations or associations. The Statute treats each "person" identically. Each Petitioner is, just like the petitioner in *Huffman*, simply a "person" within the meanings of the Statute and *Huffman* and *Indiana Ass'n of Beverage Retailers, supra*, 836 N.E.2d 255, 259. Accordingly, each Group must meet exactly the same requirements our supreme court has held that a "person" must meet

in order “to qualify for review” under the Statute. *E.g.*, *Indiana Ass’n of Beverage Retailers*, 836 N.E.2d 255, 259 (Ind. 2005); *Huffman*, 811 N.E.2d at 808 (both quoted at ¶ 42 above). The Statute does not provide that a different set of rules applies to a “person” when that “person” is a corporation or association.

48. Because the statutory definition of “person,” IND. CODE § 4-21.5-2-11, uses the word “or,” each individual member of each Petitioner is a separate “person” from each corporate Petitioner.

49. *Huffman* states: “We hold, as did the Court of Appeals, that whether a person is entitled to seek administrative review depends upon whether the person is ‘aggrieved or adversely affected’ (as provided in statute) by the administrative agency’s decision....” 811 N.E.2d at 808. The Statute does not authorize administrative review on the petition of a person who does not file a writing that states facts demonstrating that “the petitioner” is aggrieved or adversely affected by the order. The Statute does not authorize administrative review of an agency order on the petition of a person who alleges only that persons other than “the Petitioner” are aggrieved.

50. OEA’s associational standing theory is irrelevant to the issue in this case—whether the Amended Petition to OEA “state[s] facts demonstrating that the **petitioner** is aggrieved or adversely affected by the order.” IND. CODE § 4-21.5-3-7(a). *Huffman* is clear about this: “However, whether Huffman is the proper person to file a lawsuit is not at issue in this case.” 811 N.E.2d at 809. It follows, to paraphrase *Huffman*, that “whether [Citizens Groups are] the proper person[s] to file a lawsuit is not at issue in this case.” *Id.* Thus, OEA erred in finding that the issue raised by IKEC’s Motion to Dismiss was “whether Indiana recognizes ‘associational standing’ pursuant to the *Hunt* doctrine, and, if so, under what

circumstances.” The 2003 OEA Order, ¶ 55. **That is not the issue.** *Huffman* says “the judicial doctrine of standing does not apply to administrative proceedings....” 808 N.E.2d at 812. The OEA Orders defy this law by relying completely on the judicial doctrine of standing.

The issue raised by IKEC’s Motions to Dismiss was whether the Petition states facts demonstrating that “the **petitioner** is aggrieved or adversely affected by the order” renewing IKEC’s Permit, as required by the Statute. IND. CODE § 4-21.5-3-7(a). Having associational standing does not establish that the petitioner has suffered harm to a legal interest, as the “petitioner” must under *Huffman* and all the other Indiana cases on point, in order to be “aggrieved” under the Statute.

51. The 2003 OEA Order failed to decide the issue raised by IKEC’s Motion to Dismiss, and its denial of the motion without ever reaching the issue raised by the motion was arbitrary, capricious, and not in accordance with law, which requires that its Order of June 23, 2003, be set aside. IND. CODE § 4-21.5-5-14(d).

52. The notion that the courts can make up their own rules, such as associational standing, to determine who is entitled to administrative review of agency decisions under the Statute is directly contrary to the fundamental premise of *Huffman* and therefore directly contrary to the law of Indiana. If the Executive and Judicial Departments can make up the rules governing access to administrative review (which is the premise of *Save the Valley I’s* “associational standing” discussion and of the OEA Orders), then our supreme court’s statements in *Huffman* that “the Legislature may dictate access to administrative review on terms the same as or more or less generous than access to file a lawsuit,” cannot be true. Thus, OEA’s reliance on judge-made associational standing-to-sue doctrine was directly contrary to the fundamental holding of *Huffman* and therefore erroneous.

And *Huffman* stated again: “Just as the judicial doctrine of standing does not apply to administrative proceedings, its public standing component is also inapplicable.” *Id.* at 812. The same principle applies to the associational standing component of the judicial doctrine of standing, and OEA’s contrary rulings were unlawful.

53. *Huffman* says “We hold that the statute, and only the statute, defines the class of persons who can seek administrative review of agency action.” *Id.* at 813. *Save the Valley* acknowledges that the Statute does not mention associational standing. 820 N.E.2d at 679. Since only the Legislature can write statutes, and since access to administrative review is governed solely by the Statute, *Save the Valley I’s* and OEA’s invention of their own non-statutory rule for the same access violates the holding of *Huffman*, as well as Article III, Section 1 of the Indiana Constitution, which states:

The powers of the Government are divided into three separate departments: the Legislature, the Executive including the Administrative, and the Judicial; and no person, charged with official duties under one of these departments, shall exercise any of the functions of another except as in the Constitution expressly provided.

The OEA Orders are thus not in accordance with law and should be set aside. IND. CODE §§ 4-21.5-5-14(d), -15.

54. Each Citizens Group admits that it is a “person,” under the Statute (Amended Petition ¶¶ 2, 3, &4), and so in order “to qualify for review” under the Statute, each of these “persons” “**must** petition for review in a writing that ... states facts demonstrating that ... the **petitioner** is aggrieved or affected in any way by the order....” IND. CODE § 4-21.5-3-7(a)(1)(B) (emphasis added).

55. The Amended Petition filed with OEA does not state any fact demonstrating that any of the three Citizen Groups is aggrieved or affected in any way by IDEM’s Order renewing IKEC’s Permit. Paragraphs 9-12 of the Petition recite that each Group has members who are

and/or will be adversely affected by IKEC's landfill. Paragraph 13 says that "Because of the adverse effects on their members' interests which are and/or will be caused by the permitted waste site ... STV, HEC, and CAC are 'aggrieved or adversely affected persons' pursuant to IND. CODE §§ 4-21.5-3, 4-21.5-7 and 13-15-6-1." There is a missing link. The Petition does not state any fact demonstrating that any Group has any legal interest in its members' property, owns any member, insures any member, or has been assigned any legal rights of any member. The Amended Petition does not state any fact demonstrating that any Group has any "legal interest, be it a pecuniary, property, or personal interest," in aggrievement of its members; nor does it show that any such unstated legal interest is, or would be, adversely affected by IDEM's order, and so it does not comply with the Statute, which requires a statement of fact "demonstrating that the petitioner is aggrieved or adversely affected by the order."

56. *Huffman* states, "Essentially, to be 'aggrieved or adversely affected,' a **person must** have suffered or be likely to suffer in the immediate future harm to a legal interest, be it a pecuniary, property, or personal interest." 811 N.E.2d at 810 (emphasis added). *Huffman* cites three cases for this definition of "aggrieved": *McFarland v. Pierce*, 151 Ind. 546, 45 N.E. 706 (1897); *Stout v. Mercer*, 160 Ind. App. 454, 460 312 N.E.2d 515, 518 (1974); and *Bagnall v. Town of Beverly Shores*, 726 N.E.2d 782, 786 (Ind. 2000). Each of these cases was decided under a statute different from AOPA, and so *Save the Valley I's* attempt to distinguish pertinent cases because they were decided under different statutes from AOPA is erroneous. (The same basis for distinction applies to *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333 (1977), and the other cases in the long string cite in *Save the Valley I*, 820 N.E.2d, at 680. None of those cases was decided under AOPA and few were decided under any statute at all, and so all are, by *Save the Valley I's* analysis, inapposite here. The cited cases were overwhelmingly

decided under the judicial doctrine of standing, which *Huffman* says “does not apply to administrative proceedings....” 811 N.E.2d, at 812.)

The page of *Bagnall* that *Huffman* cites for the meaning of “aggrieved” as used in the Statute defines “aggrieved” solely by reference to *The Three Association Cases* (cited individually above at ¶ 42). Like *Stout v. Mercer* and *Bagnall*, *Robertson* and *Williams-Woodland Park* were decided under IND. CODE § 36-7-4-1003(a); *Union Twp. Residents Ass’n* was under IND. CODE § 36-7-14-18, which is identical to § 36-7-4-1003, except that it allows a “person aggrieved” to obtain judicial review of redevelopment commission decisions instead of BZA decisions. See also *Thomas v. Blackford County Area Bd. of Zoning Appeals*, 907 N.E.2d 988 (Ind. 2009) (again citing *Robertson* and *Union Twp. Residents Ass’n* for the meaning of “aggrieved”).

So *Huffman* says that the definition of “aggrieved,” as the term is used in the Statute, is the one that *Bagnall* derived from *The Three Association Cases*, which definition is the same one in BLACK’S LAW DICTIONARY and the same one in use under Indiana law ever since *McFarland v. Pierce* was decided more than a century ago. Each of *The Three Association Cases* holds that an association is not aggrieved by injury to its members. ***Huffman’s pinpoint citation of page 786 of Bagnall is in fact our supreme court’s holding that The Three Association Cases state the definition of “aggrieved” applicable to every “person” under the Statute.*** Thus, *Save the Valley I’s* and OEA’s refusal to acknowledge the pertinence of these cases because they arose “under a different statutory scheme” (*i.e.*, the exact scheme *Huffman* holds to be analogous to the Statute) is contrary to *Huffman* and an unlawful refusal to acknowledge that the word “aggrieved,” means what *Huffman* says it means when used in the Statute.

57. *Indiana Ass'n of Beverage Retailers, Inc. v. Indiana Alcohol and Tobacco Comm'n*, 836 N.E.2d 255 (Ind. 2005), reaffirmed that the *Huffman-Bagnall-McFarland-Three Association Cases* definition of “aggrieved” applies in association cases arising under the Statute:

ATC correctly contends that **a person must show direct injury** to become a “party” to an administrative proceeding. In *Huffman v. Office of Environmental Adjudication*, 811 N.E.2d 806 (Ind. 2004), we pointed out that “AOPA itself identifies who may pursue an administrative proceeding.” *Id.* at 809. We noted that under section 3-7 of AOPA **a person** must be “aggrieved or adversely affected” in order to seek administrative review. *Id.* at 810 (citing I.C. § 4-21.5-3-7(a)(1)(B)... *Huffman* defined this as “harm to a legal interest, be it a pecuniary, property or personal interest.” *Huffman*, 811 N.E.2d at 810. **Persons** who do not meet the standard may remonstrate, but are **not** entitled to push the process to the next level by seeking administrative or judicial review.

836 N.E.2d at 259 (emphasis added). By this test, laid down by our supreme court in an association case, Groups did not “meet the standard” to qualify for administrative review under the Statute, and OEA’s and *Save the Valley I’s* contrary rulings are not in accordance with the law of Indiana stated by our supreme court in *Huffman* and *Indiana Ass’n of Beverage Retailers*. The Petition before OEA does not state facts demonstrating any “direct injury” to any Citizen Group and does not show harm to “any legal interest” of any Group, “be it a pecuniary, property, or personal interest.” That failure required dismissal of the Amended Petition.

When, in the interim between the first and second decisions of the lower court, a higher court to which the court owes obedience issues an opinion directly on point and irreconcilable with the earlier decision, the court is to disregard the law of the case and is to apply the new precedent. *18 Moore’s Federal Practice* § 134.21[3][b] (3d ed. 2005); *Cole Energy Dev. Co. v. Ingersoll-Rand Co.*, 8 F.3d 607, 609 (7th Cir. 1993).

58. Inferior courts of Indiana are bound by decisions of the Indiana Supreme Court unless and until such decisions are overruled **by that court**. *State ex rel. Meyer-Kiser Bank v. Superior Court of Marion County*, 177 N.E. 322, 325-26 (Ind. 1931).

Inferior courts of Indiana are bound by decisions of the court of appeals only when not in conflict with decisions of our Supreme Court. *Daily v. Pugh*, 131 N.E. 836, 839 (Ind. App. 1931). OEA's refusal in the 2006 OEA Order to reconsider the 2003 OEA Order in light of *Huffman*, *Indiana Ass'n of Beverage Retailers*, and *Mutual Medical* was not in accordance with law.

59. *Save the Valley I's* attempt to distinguish the *Three Association Cases* evidences confusion on the part of the panel. The proposition for which those cases stand is that, when the word "aggrieved" is given the identical *verbatim* meaning which *Huffman* says it has in the Statute, an association is not "aggrieved" by injury to its members, and a "person" not suffering "personalized harm," *Huffman*, 811 N.E.2d at 812, cannot secure review based on harm to another person. *Accord*, *Indiana Ass'n of Beverage Retailers*, 836 N.E.2d at 259 (a person not able to show "direct injury" or not suffering harm to a legal interest cannot seek administrative review under the Statute); *Thomas v. Blackford County Area Bd. of Zoning Appeals*, 907 N.E.2d 988 (Ind. 2009). That is dispositive here, because the Statute says that in order "to qualify for review," a "person" "must" file a petition showing that the "petitioner" is "aggrieved or adversely affected by the order." Since an association or corporation (a "person" under the Statute) is not aggrieved by alleged injury to its members under these cases, and since one "person" is not aggrieved by injury to another "person," the Amended Petition to OEA in this case does not "qualify for review" under the Statute.

The OEA Orders conflict with all the cases on point decided or cited with approval by our Supreme Court. Those OEA Orders are, accordingly, not in accordance with this law and should be set aside under IND. CODE §§ 4-21.5-5-14(d), and -15.

60. *Save the Valley I* and OEA did not consider whether the Amended Petition stated facts demonstrating that the Citizen Groups are “aggrieved,” but erroneously addressed the separate, and different, issue of whether Citizen Groups would have associational standing to sue in court, but that is forbidden by *Huffman*. “[T]he rules for determining whether the person has ‘standing’ to file a lawsuit do not apply.” *Huffman*, 811 N.E.2d at 808.

61. Similarly, the law of Indiana is that

[I]f the Legislature use words which have received a judicial construction they are presumed to be used in that sense, unless the contrary intent can be gathered from the statute. 2 Lewis’ Sutherland Stats. Const. (2d Ed.) § 399, pp. 758, 759, and cases cited under note 36; 26 Am. & Eng. Ency. of Law (2d Ed.) 607; *Burk v. State*, 27 Ind. 430, 431; *State v. Berdetta*, 73 Ind. 185, 188, 38 Am. Rep. 117; *Western Union, etc., Co. v. Scircle*, 103 Ind. 227, 229, 2 N. E. 604; *Board v. Bailey*, 122 Ind. 46, 48, 23 N. E. 672; *Sopher v. State*, 169 Ind. 177, 181, 81 N. E. 913, 14 L. R. A. (N. S.) 172; *Truelove v. Truelove*, 172 Ind. 441, 444, 86 N. E. 1018, 88 N. E. 516, 27 L. R. A. (N. S.) 220.

Indiana Trust Co. v. Griffith, 176 Ind. 643, 95 N.E. 573 (1911).

The Indiana Supreme Court has attributed a single, consistent meaning to the word “aggrieved” ever since *McFarland v. Pierce*. Our supreme court reaffirmed that meaning (and its consistency with the Court of Appeals’ decisions in *The Three Association Cases in Bagnall*, in *Huffman*, and in *Thomas v. Blackford County Area Bd. of Zoning Appeals*. Under that meaning of “aggrieved,” as this Court held in 2003, a membership corporation is not “aggrieved” by harm to its member. The OEA Orders at *Exhibits A, B, & C* are premised on a contrary meaning of “aggrieved” and so are not in accordance with law and should be set aside.

62. The OEA Orders are also inconsistent with the Indiana judicial doctrine of standing as enunciated by the Indiana Supreme Court, under which “one may not assert a cause

of action based solely on the infringement of the rights of others.” *State v. Monfort*, 723 N.E.2d 407, 415 & n.5 (Ind. 2000), *reh’g denied*; *City of Indianapolis v. State Tax Comm’rs*, 308 N.E.2d 868 (Ind. 1974); *In re Remonstrance Appealing Ordinance Nos. 98-004, etc. of the Town of Lizton v. Storm*, 769 N.E.2d 622, 628 (Ind. Ct. App. 2002); *accord*, *Bagnall v. Town of Beverly Shores*, 726 N.E.2d 782, 786 (Ind. 2000); *City of Hammond v. Bd. of Zoning Appeals*, 284 Ind. 119, 126 (Ind. 1972); *Deaton v. City of Greenwood*, 582 N.E.2d 882, 885 (Ind. Ct. App. 1991); *Liberty Landowners Ass’n, Inc. v. Porter County Comm’rs*, 913 N.E.2d 1245, 1250-52, (Ind. Ct. App. 2009).

THE OEA PROCEEDING WAS NOT PROSECUTED BY THE REAL PARTIES IN INTEREST AND SO IT SHOULD HAVE BEEN DISMISSED.

63. In *Huffman*, the petitioner to OEA attempted to challenge Lilly’s permit based in part on harm to the corporation that owned the affected real estate because she owned a corporation that owned one unit of, and was the managing member of, the corporation that owned the affected real estate. That was held insufficient to make her aggrieved, and our supreme court held that administrative review by OEA could be had only by the owner of the affected legal rights, *i.e.*, the corporation. 811 N.E.2d at 814-15. That decision is parallel to the one in *McFarland v. Pierce*, *supra*. In this case the owners of all the real estate and other alleged legal rights involved are the individual members of Citizen Groups, and so the Groups are not aggrieved, are not the real parties in interest, and do not “qualify for review” under the Statute. OEA invoked the Indiana Trial Rules at the outset in the 2003 OEA Order. Trial Rule 17(A) provides: “Every action shall be prosecuted in the name of the real party in interest.” Failure to do so may result in dismissal, *see* Trial R. 12(B)(6), and so resulted in *Huffman*.

64. For the reasons set forth above, the OEA Orders at *Exhibits A, B and C* are arbitrary; capricious; not in accordance with law; in violation of the constitutional separation of

powers that prohibits the Executive Branch from intruding upon the exclusive provinces of the Judiciary and Legislature; in excess of statutory jurisdiction, authority and limitations under IND. CODE § 4-21.5-3-7(a) (which limits OEA authority to cases in which the petition for review demonstrates that: “the *petitioner* is aggrieved or adversely affected by the order.”); and without observance of procedure required by law.

65. IKEC is aggrieved by the OEA Orders because they jeopardize the permits necessary for operation of IKEC’s business. The Order of June 23, 2003, at *Exhibit A* necessitated seven years of additional litigation on the basis of allegations of aggrievement in Citizens Groups’ Petition and Amended Petition to OEA that were ultimately proved to be without basis as held in the OEA Orders at *Exhibits D1 – D4*. The OEA Order at *Exhibit A* was later incorporated by reference by OEA’s Environmental Law Judge in OEA Cause No. 08-S-J-4106 as a basis for denying IKEC’s motion to dismiss Citizen Groups’ petition for review of IKEC’s 2008 solid waste disposal facility permit for its Clifty Creek Station. That litigation is still pending at the date this Verified Petition for Judicial Review is filed.

WHEREFORE, IKEC prays that this Court (1) order, adjudge, and decree that the OEA Orders (*Exhibits A, B and C*) are arbitrary, capricious, not in accordance with law, and without observance of the procedure required by law; (2) vacate and set aside those OEA Orders; (3) remand the matter to OEA with direction to dismiss Citizen Groups’ Original and Amended Petitions for Review forthwith pursuant to IND. CODE § 4-21.5-5-15, because they do not meet the mandatory criterion of IND. CODE § 4-21.5-3-7(a)(1)(B); and (4) award IKEC its costs of litigation and all such other relief as is proper.

VERIFICATION

I affirm under penalty of perjury that the foregoing statements are true and accurate to the best of my knowledge.

Donald T. Fulkerson
Environmental Affairs Director
Indiana-Kentucky Electric Corporation

I affirm under penalty of perjury that the foregoing statements are true and accurate to the best of my knowledge.

Bryan G. Tabler (Atty. No. 787-49)
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II. COMPLAINT TO SET ASIDE AS VOID AND GRANT RELIEF FROM THIS COURT’S JUDGMENT OR ORDER OF SEPTEMBER 6, 2005

Plaintiff Indiana-Kentucky Electric Corporation (“IKEC”) states the following as its complaint to set aside as void and grant relief from this Court’s judgment or order of September 6, 2005.

1. Pursuant to Indiana Trial Rule 60(B)(6) and -(8), IKEC prays that this Court set aside or clarify its order issued in handwritten form on or about September 6, 2005, in Cause Nos. 49F12-0307-MI-002024 (*Exhibit M*) and 49F12-0307-PL-002327 (IDEM’s parallel and consolidated action). That order, never served on the parties, stated “Remanded to the Indiana Office of Environmental Adjudication (“OEA”) for further proceedings consistent with the decision of the Court of Appeals of Indiana in Case No. 49A04-0312-CV-610” (referring to *Save the Valley, Inc. v. Indiana-Kentucky Electric Corporation*, 820 N.E.2d 677 (Ind. Ct. App. 2005), *aff’d on reh’g*, 824 N.E.2d 776 (2005), *trans. denied*). The Court of Appeals proceeding cited in the order is hereinafter referred to as “*Save the Valley I*.”

2. In *Save the Valley I*, the Court of Appeals held that this Court erroneously denied the Joint Motions to Dismiss of Appellants Citizens Action Coalition of Indiana, Inc.; Hoosier Environmental Council, Inc.; and Save the Valley, Inc. “[T]he trial court was without subject matter jurisdiction and ... the Appellees must comply with AOPA procedures for seeking judicial review.” *Save the Valley I*, 824 N.E.2d 776.

3. IKEC here incorporates ¶¶ 3 - 8 and 10 - 24 of its Verified Petition for Judicial Review.

4. Because the Court of Appeals in *Save the Valley I* lacked subject matter jurisdiction, everything in the Court of Appeals’ decision was void, except for its reversal of

this Court's denial of Petitioners motions to dismiss for lack of subject matter jurisdiction on grounds of failure to exhaust administrative remedies.

5. IKEC here incorporates ¶¶ 30 – 39 of its Verified Petition for Judicial Review.

6. Because the courts in *Save the Valley I* lacked subject matter jurisdiction and were without authority “to do anything in the case except to enter an order of dismissal,” *Family and Social Servs. Admin. v. Legacy Healthcare*, 756 N.E.2d 567, 572 (Ind. Ct. App. 2001), and because anything beyond that was “void,” *id.*, this Court was required to dismiss for lack of subject matter jurisdiction, and its “remand[] for proceedings consistent with [*Save the Valley I*]” is void and impossible to comply with.

WHEREFORE, IKEC prays that this Court set aside as void, or clarify and grant IKEC relief from, this Court's order of September 6, 2005, in the *Save the Valley I* cases, and enter in its stead an order expressly granting Citizens Groups' Joint Motions to Dismiss (*Exhibits F & G*) the cases for lack of subject matter jurisdiction, without adjudication of any other issue, as required by the Court of Appeals in *Save the Valley I*.

III. COMPLAINT FOR DECLARATORY JUDGMENT

Plaintiff Indiana-Kentucky Electric Corporation (“IKEC”) states the following for its complaint for declaratory judgment against defendants Citizens Action Coalition of Indiana, Inc.; Hoosier Environmental Council, Inc.; Save the Valley, Inc. (“Citizens Groups” or Defendants”):

1. IKEC seeks a declaratory judgment determining the following question of construction arising out of the statute at IND. CODE §§ 4-21.5-3-7(a)(1)(B) (the “Statute”):

In order to qualify for administrative review by the Indiana Office of Environmental Adjudication (“OEA”), must a person which is a membership corporation or association file a petition that states facts demonstrating that petitioner is “aggrieved or adversely affected” (as that phrase is defined by the Indiana Supreme Court in *Huffman v. Indiana OEA*, 811 N.E.2d 806 (Ind. 2009)) by an order of the Indiana Department of Environmental Management, or can such a person which is itself not affected by IDEM’s order qualify for administrative review by filing a petition that states facts showing that its member who is not a party to the proceeding is aggrieved or adversely affected by IDEM’s order?

2. As set forth below, IKEC previously sought a judicial determination of this same issue, but this Court was adjudged to lack subject matter jurisdiction because IKEC had not exhausted its administrative remedies. *See Save the Valley, Inc. v. Indiana-Kentucky Electric Corporation*, 820 N.E.2d 677 (Ind. Ct. App. 2005), *aff’d on reh’g*, 824 N.E.2d 776 (2005), *trans. denied*. As set forth in the OEA Orders at Exhibit D, that objection has now been obviated and the matter is ripe for judicial resolution.

3. IKEC incorporates by this reference the following paragraphs of its Verified Petition for Judicial Review served and filed on April 15, 2010: paragraphs 10-24, 26-39 (but not the last sentence), 40 (but not the last sentence), 41-47, 49-50, 52-59 (but not the last sentence), and 60-65, including all Exhibits referred to therein and/or herein.

4. In 2008 Defendants commenced another OEA review proceeding on the basis that its members are aggrieved by IDEM’s order of April 15, 2008, renewing and modifying the

operating permit for IKEC's Clifty Creek Station Landfill. IKEC moved to dismiss because Defendants' 2008 petition to OEA does not state facts demonstrating that any petitioner therein is aggrieved by IDEM's Order. OEA denied that motion by the Order of March 18, 2009 at *Exhibit N*.

5. The OEA Order at *Exhibit N* held that the decision in *Save the Valley I* by a court that held itself to be without summary judgment decided the issues raised herein and that IKEC was collaterally estoppel to argue to the contrary. *Id.* at ¶¶ 18-22. Defendants' Brief filed in the 2008 OEA proceeding on May 22, 2009, at pp. 5-6, argued that collateral estoppel applied. *See Exhibit O*.

6. On June 5, 2009, OEA issued an Order (*Exhibit P*) that modified its Order as *Exhibit N* by retracting the collateral estoppel point, because the 2003 and 2006 OEA Orders were not final. Nonetheless, OEA refused to hear IKEC's arguments, because it deems itself bound by *Save the Valley I* even though the court lacked subject matter jurisdiction and held that no declaratory judgment or judicial review could occur in the case for lack of subject matter jurisdiction.

7. The OEA Order at ¶ 8 of *Exhibit P* incorporated by reference the conclusions of law in the 2003 OEA Order.

8. The OEA Order at ¶ 7 of *Exhibit P*, ignoring all applicable precedent, holds that the Court of Appeals had subject matter jurisdiction in *Save the Valley I* and declares that "OEA recognizes associational standing." *Id.* at ¶ 8 at n.2.

9. For these reasons, IKEC has no administrative remedy and no remedy at law. OEA deems itself foreclosed on the question of statutory construction IKEC raises herein by the decision of a court that lacked subject matter jurisdiction.

10. The permits necessary for IKEC to conduct its business are jeopardized by the proceedings described above.

11. When one of the largest agencies of the government of the State of Indiana, responsible for issuing and adjudicating the validity of environmental permits necessary for operation of virtually every industrial facility in the State, holds itself foreclosed, by the utterances of a court without subject matter jurisdiction, from considering well supported legal arguments and a decision of the Indiana Supreme Court and directly on point (*Huffman*), it is a matter of grave and serious public interest. This wrong is not only capable of repetition, it has been repeated.

12. The issue raised herein deserves resolution by a court that has subject matter jurisdiction over the case and over the issue, which the courts *Save the Valley I* did not have. Although Defendants argue that no time is the right time, now is the right time for a court with subject matter jurisdiction to construe the statute. Lack of subject matter jurisdiction can be raised at any time and is raised now.

13. Defendants are barred by *Save the Valley I's* holding that this Court erred in not granting their motions to dismiss the case for lack of subject matter jurisdiction and its ruling that “[T]he trial court was without subject matter jurisdiction” from contending that the Court of Appeals had subject matter jurisdiction to affirm the 2003 OEA Order or issue any binding law on its correctness by the doctrines of *res judicata*, collateral estoppel, and judicial estoppel.

WHEREFORE, IKEC respectfully prays that this Court order, adjudge, and declare as follows:

Defendants are “persons” within the meaning of IND. CODE §§ 4-21.5-1-12 and the remainder of IND. CODE §§ 4-21.5. The statute and only the statute, defines the class of persons

who can seek administrative review of agency action. The statute treats all persons identically and does not contain any special provisions for membership corporations or associations. Whether a person is entitled to seek administrative review depends upon whether the person is “aggrieved or adversely affected” (as provided in IND. CODE §§ 4-21-5-3.7(a)(1)) by the administrative agency’s decision, and the rules for determining whether the person has “standing” to file a lawsuit do not apply.

An organization or membership association does not satisfy the requirement of IND. CODE §§ 4-21.5-3-7(a)(1)(B) by stating facts that demonstrate that its members are aggrieved or adversely affected by the order of which review is sought. In order to invoke administrative review under Indiana’s Administrative Orders and Procedures Act, a petitioner seeking review under IND. CODE §§ 4-21.5-3-7(a)(1)(B) must petition for review in a writing that states facts demonstrating that “the petitioner is aggrieved or adversely affected by the order” of which review is sought. *Id.* Allegations by an unaffected association that members of the association (or any persons than the petitioner itself) are aggrieved are not sufficient to satisfy the statute.

IKEC also prays for its costs of this action and for all other relief appropriate in the circumstances.

Respectfully submitted,

/s/ Bryan G. Tabler

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Certificate of Service

The undersigned hereby certifies that a true and accurate copy of the foregoing has been served on the following this 17th day of May 2010, by United States Certified Mail, return receipt requested.

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/s/ Bryan G. Tabler

Bryan G. Tabler

- D.2. OEA Final Order of October 6, 2008, granting partial summary judgment on surface water issues, including NPDES-permitted discharges and seepage
- D.3(a). OEA Final Order of August 24, 2009, granting partial summary judgment on Madison Water Company issues
- D.3(b). Citizens Groups' Petition for Judicial Review of Exhibit D.3(a), Cause No. 49F12-0909-MI-044249
- D.3(c). IKEC's motion to Dismiss Exhibit D.3(b) pursuant to Trial R. 12(B)(6)
- D.3(d). This Court's Order of Dismissal dated November 12, 2009, in 49F12-0909-MI-044249, dismissing Exhibit 3(b) pursuant to Trial R. 12(B)(6)
- D.4 Final Order of March 17, 2010, granting IKEC summary judgment on all remaining issues
- E. Citizens Groups' Petition for Review in OEA Cause No. 02-S-J-2989 (Dec. 26, 2002) and Amended Verified Petition for Review (March 31, 2003)
- F. Citizens Groups' Motion to Dismiss IKEC's Verified Petition for Judicial Review and Complaint for Declaratory Judgment in *Save the Valley I* under Trial R. 12(B)(1) and Brief in support
- G. Citizens Groups' Motion to Dismiss IDEM's Verified Petition for Judicial Review in *Save the Valley I* under Trial R. 12(B)(1) and Brief in support
- H. Citizens Groups' Brief to the Court of Appeals in *Save the Valley I*
- I. IKEC's Motion to Reconsider OEA's Order of June 23, 2003
- J. OEA Order of August 27, 2003, disclaiming subject matter jurisdiction in OEA Cause No. 02-S-J-2989 during pendency of *Save the Valley I* in the courts (or from July 3, 2003, until September 6, 2005)
- K. OEA Order of November 3, 2003, staying all proceedings in OEA Cause No. 02-S-J-2989 until further order (which further order was issued October 7, 2005)
- L. IKEC's Motion to Reconsider in Light of *K.S. v. State* and *Shoopman v. Packard* filed with OEA on September 26, 2006
- M. Minutes of the Court dated September 6, 2005, in No. 49F12-0307-PL-002024 (*Save the Valley I*)
- N.** OEA Order of March 18, 2009, in OEA Cause No. 08-S-J-4106

** Exhibits N, O, & P are served with IKEC's Verified Petition for Judicial Review and Amended Complaint served and filed on May 17, 2010.

- O. Reply of Citizens Groups in OEA Cause No. 08-S-J-4106, filed May 22, 2009
- P. Modified OEA Order of June 5, 2009, in OEA Cause No. 08-S-J-4106