

**In re: Alcoa, Inc. v. Indiana Department of Environmental Management  
2004 OEA 30 (03-A-J-3211)**

---

**TOPICS:**

PSD

NAAQS

USEPA

Sec. 107 Clean Air Act

40 CFR 50, App. D

Ind. Code § 4-21.5-1-9

urban scale monitoring site

rulemaking

ambient air

ozone

attainment

nonattainment

air monitor data

private property

voluntary permission

determination letter

agency action

subject matter jurisdiction

order

motion for summary judgment

motion to dismiss

**PRESIDING JUDGE:**

Davidsen

**PARTY REPRESENTATIVES:**

Permittee: Anthony Sullivan, Esq., Loraine L. Seyfried, Esq., Barnes & Thornburg

IDEM: April Schultheis, Esq.

**ORDER ISSUED:**

April 30, 2004

**INDEX CATEGORY:**

Air

**FURTHER CASE ACTIVITY:**

[none]

---

**In re: Alcoa, Inc. v. Indiana Department of Environmental Management  
2004 OEA 30 (03-A-J-3211)**

STATE OF INDIANA	)	BEFORE THE INDIANA OFFICE OF
	)	ENVIRONMENTAL ADJUDICATION
COUNTY OF MARION	)	

IN THE MATTER OF:	)	
	)	
ALCOA, INC.	)	
Petitioner,	)	
	)	
vs.	)	CAUSE NO. 03-A-J-3211
	)	
COMMISSIONER, INDIANA DEPARTMENT OF	)	
ENVIRONMENTAL MANAGEMENT.	)	
Respondent.	)	

**FINDINGS OF FACT, CONCLUSIONS OF LAW and FINAL ORDER  
on RESPONDENT INDIANA DEPARTMENT OF ENVIRONMENTAL  
MANAGEMENT’S MOTION TO DISMISS**

*Please be notified that Office of Environmental Adjudication (“OEA” or “Court”) Cause No. 03-A-J-3211 is hereby dismissed from the OEA under Ind. Code § 4-21.5, et seq., 315 IAC 1, and Ind. Tr. R. 12(B)(1), for lack of subject matter jurisdiction. The Environmental Law Judge hereby makes the following findings of fact and conclusions of law:*

**Findings of Fact**

1. The issues in controversy in this matter were raised to the Court in the parties’ Briefs on Petitioner, Alcoa, Inc.’s (“Alcoa”) Motion for Summary Judgment and on the Indiana Department of Environmental Management’s (“IDEM”) Motion to Dismiss, with both parties timely filing responsive pleadings. In their March 11, 2004 pleadings, the parties invoked Ind. Code § 4-21.5-2-2 and waived any requirement to schedule or conduct a hearing on Summary Judgment stated in Ind. Code § 4-21.5-3-23.
2. The parties’ pleadings do not dispute that an ozone monitor had been in place and in operation on Alcoa’s property since at least the 1990’s, with Alcoa voluntarily granting IDEM permission to operate the monitor at an existing air and meteorological station on the Alcoa Warrick Operations site in Newburg, IN since April, 1995. Alcoa September 23, 2003 letter to IDEM.
3. The parties now contest whether the ozone monitor located on Alcoa’s property can be legally used to measure “ambient air” as required for calculating ozone concentrations. In summary, the parties asked the Court to determine, as a matter of law, whether air monitor data collected from a monitor located on private property may be used by IDEM to measure ambient air. If it is determined that the monitor on Alcoa’s private property does measure ambient air as defined in the relevant regulations, then its data will be used to determine Warrick County’s and southwest Indiana’s attainment or nonattainment status for ozone. In this case, a determination that the monitor on Alcoa’s property may be used to measure ambient air would likely result in a determination that Warrick

**In re: Alcoa, Inc. v. Indiana Department of Environmental Management  
2004 OEA 30 (03-A-J-3211)**

- County may be determined to be in nonattainment levels for ozone, potentially subjecting its population to stringent area-wide control strategies.
4. On September 23, 2003, Petitioner Alcoa, by its Environmental Manager for Alcoa's Warrick Operations, Scott Darling, submitted a letter to IDEM's Assistant Commissioner for the Office of Air Quality, Janet McCabe, stating that "[t]he purpose of this letter is to express Alcoa's position that ozone concentrations measured at the Warrick station do not represent concentrations of ozone in "ambient air" and therefore cannot be legally used to evaluate attainment with the NAAQS." After supporting its position by facts specific to the location of the air monitor and further questioning the ability of the monitor to provide data which appropriately subtracted Alcoa's on-site contribution, Alcoa's September 23, 2003 letter stated, "Given that the Warrick monitor cannot be used to evaluate ozone "ambient air" levels, Alcoa recommends that the State of Indiana and EPA must make their determination for Warrick County using data only from the Boonville and Lynnville "ambient air" monitors." Alcoa's September 23, 2003 letter is attached hereto as Exhibit 1.
  5. IDEM's October 7, 2003 written response to Alcoa's September 23, 2003 letter stated, in summary, that IDEM considered the site on Alcoa's property to be an urban scale monitoring site, and that after consultation, representatives of EPA Region V agreed with IDEM that the monitor measured ambient air. IDEM's October 7, 2003 responsive letter is attached hereto as Exhibit 2.
  6. Alcoa timely filed its October 22, 2003 Petition for Adjudicatory Hearing and Administrative Review ("Petition"). In its Petition, Alcoa challenged IDEM's determination that the monitor measured ambient air, as stated in IDEM's October 7, 2003 letter (as referenced by Petitioner, "determination letter"). Alcoa later was granted leave to submit its Amended Petition for Administrative Review on March 11, 2004. For purposes of the issues addressed in this Order, the issues addressed on amendment were included in the original petition. Therefore, the Court will refer to Alcoa's original petition for administrative review in the below analysis.
  7. A prehearing conference was scheduled in this matter on December 17, 2003, but was continued on joint motion of the parties; a Case Management Order concerning scheduling was issued, and subsequently modified for expedition. Petitioner also submitted an Amended Petition for Administrative Review, after the parties participated in a case conference with the Court. Along with the substantive issues concerning permissible locations for ambient air monitors, the parties raised the procedural issue as to whether IDEM's determination letter constituted an Order as applied in Ind. Code § 4-21.5, et seq., so as to confer jurisdiction to OEA.
  8. Ind. Code § 4-21-5-1-9 defines an Order, in pertinent part, as "an agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one (1) or more specific persons."
  9. Ind. Code § 4-21.5-1-3 defines an Agency Action as any of the following:
    - (1) The whole or a part of an order.
    - (2) The failure to issue an order.
    - (3) An agency's performance of, or failure to perform, any other duty, function, or activity under this article (Ind. Code § 4-21.5, et seq.).

**In re: Alcoa, Inc. v. Indiana Department of Environmental Management  
2004 OEA 30 (03-A-J-3211)**

10. Neither of the parties presented authority indicative of a specific, existing permitting or notice process to be used to designate which monitors are to be used as ambient air monitors to collect data to determine ozone levels. The parties eloquently briefed whether ambient air may be collected from a monitor located on private property. Alcoa accurately contends that all of the numerous applicable state and federal regulations require measurements be limited exclusively to ambient air. Alcoa asserted that IDEM should have engaged in rulemaking procedures referenced in Ind. Code § 4-22, et seq., so as to afford minimum due process rights to those, such as Alcoa, subject to “[t]he whole or any part of any agency statement of general applicability that (1) has or is designed to have the effect of law; and (2) implements, interprets, or prescribes: (A) law or policy; or (B) the organization, procedure, or practice requirements of an agency.” Ind. Code § 4-22-2-3(b). Alcoa further asserts that, at minimum, IDEM should have given advance notice of its intent to use a monitor located on private property in a Non-Rule Policy document, per Ind. Code § 31-4-1-11.5.
11. This Court’s jurisdiction is limited to, and cannot be extended beyond, those matters over which the legislature has determined that it may exert subject matter jurisdiction. Ind. Tr. R. 12(B)(1); LTV Steel Company v. Griffin, 730 N.E.2d 1251, 1257 (Ind. 2000). A court’s subject matter jurisdiction may be raised by the Court itself, sua sponte. Clayton K. Stewart v. Kingsley Terrace Church of Christ, Inc., 767 N.E.2d 542, 544. (Ind. App. 2002). In ruling on a motion to dismiss for lack of subject matter jurisdiction, affidavits or evidence submitted in support may be considered. Fratus v. Marion Community Schools Bd., 749 N.E.2d 40, 43 (Ind. 2001), citing Perry v. Stitzer Buick GMC, Inc., 637 N.E.2d 1282, 1287 (Ind. 1994). In addition, evidence may be weighed, so as to determine the existence of requisite jurisdictional facts. Id. This Court must first establish that it has jurisdiction over the subject matter of this case. In order to determine whether it has subject matter jurisdiction, this Court must determine whether IDEM’s determination letter of September 23, 2003 is an order, so that it can be subject to administrative review before OEA.
12. An evaluation as to whether IDEM’s determination letter was an order per Ind. Code § 4-21.5-1-9 first requires review as to whether IDEM’s determination concerning the monitor on Alcoa’s property was an agency action. The designation of a specific monitor from which to collect data is “an agency’s performance of, or failure to perform, any other duty, function, or activity under this article” as contemplated in Ind. Code § 4-21.5-1-4(3). The data is collected as part of IDEM’s duty and function to provide data to provide input and an initial recommendation to the Administrator of the USEPA (“Administrator”) as required by Section 107 of the Clean Air Act. In providing its input and initial recommendation concerning ozone attainment, IDEM must follow the methods stated at 40 CFR § 50, et seq., with the authority to “exclude, retain, or make adjustments to the data . . . subject to the approval of the appropriate (EPA) Regional Administrator.” 40 CFR 50 App. D.
13. To constitute an order over which OEA would have subject matter jurisdiction, IDEM’s determination that the monitor on Alcoa’s private property measured ambient air must be an agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one (1) or more specific persons, in compliance with Ind. Code § 4-21.5-1-9. IDEM’s determination that a specific monitor measures ambient air did not contain sufficient specificity to whom it was directed, and

**In re: Alcoa, Inc. v. Indiana Department of Environmental Management  
2004 OEA 30 (03-A-J-3211)**

thus was not an agency action of particular applicability determinative of the legal rights, duties, privileges, immunities, or other legal interests of one (1) or more specific persons. Alcoa may have well-founded concerns that use of the data from the monitor on its property may quickly lead to a determination that Warrick County and/or southwest Indiana is determined to be nonattainment for ozone, and may lead to burdens on Alcoa, as well burden unspecified others. However, IDEM's determination to utilize the monitor's data does not directly lead to an order of nonattainment for ozone levels, nor does it directly lead to specified actions to be taken by those, such as Alcoa, in the potential nonattainment area. Instead, IDEM's determination to use data operates, as a matter of law, as input and recommendation subject to EPA's authority, after which time EPA's decision is subject to review in the appropriate forum.

14. OEA's jurisdiction over IDEM's determination to use data from the monitor located on Alcoa's property is not conferred by Ind. Code § 4-21.5-3-6(a)(5), as a determination of status, nor as an action subject to rulemaking as "[t]he whole or any part of any agency statement of general applicability that (1) has or is designed to have the effect of law; and (2) implements, interprets, or prescribes: (A) law or policy; or (B) the organization, procedure, or practice requirements of an agency." Ind. Code § 4-22-2-3(b). IDEM's determination applied only to one monitor, versus an entire class, and stated limits within its authority to provide input and initial recommendations to EPA, instead of ordering designation of ozone attainment or nonattainment levels.
15. OEA's jurisdiction over IDEM's determination to use data from the monitor located on Alcoa's property fails to be conferred by Ind. Code § 4-21.5-3-6(a)(6), as "[a]ny order that does not impose a sanction, or terminate a legal right, duty, privilege, immunity or other legal interest." IDEM's determination serves as input and/or a recommendation to the EPA, who has been delegated the authority to determine ozone level attainment/nonattainment. Alcoa's briefs state the burdens it expects to incur from IDEM's determination, from increased operating costs, to its reputation as a responsible corporate citizen. These burdens are not derived from IDEM's actions which do not "impose a sanction", do not "terminate a legal right, duty, privilege, immunity or other legal interest. And, the actual burdens upon Alcoa may only be determined after EPA's Regional Administrator determines whether Warrick County and/or southwest Indiana will be in attainment or nonattainment.

**In re: Alcoa, Inc. v. Indiana Department of Environmental Management  
2004 OEA 30 (03-A-J-3211)**

**Conclusions of Law**

1. The Office of Environmental Adjudication (“OEA”) has jurisdiction over the decisions of the Commissioner of the Indiana Department of Environmental Management (“IDEM”) and the parties to this controversy pursuant to Ind. Code § 4-21.5-7, et seq.
2. This is a Final Order issued pursuant to Ind. Code § 4-21.4-3-27. Findings of Fact that may be construed as Conclusions of Law and Conclusions of Law that may be construed as Findings of Fact are so deemed.
3. IDEM’s determination letter of October 7, 2003 did not constitute an order subject to review under Ind. Code § 4-21.5, et seq. OEA therefore has no subject matter jurisdiction over the Petition for Adjudicatory Hearing and Administrative Review filed by Petitioner, Alcoa, Inc. on October 22, 2004. Alcoa, Inc.’s Petition must therefore be dismissed.

**Final Order**

IT IS THEREFORE ORDERED that the Petition for Adjudicatory Hearing and Administrative Review filed by Petitioner Alcoa, Inc. on October 22, 2004 is hereby dismissed for lack of subject matter jurisdiction by the Office of Environmental Adjudication.

You are hereby further notified that pursuant to provisions of Indiana Code § 4-21.5-7.5, the Office of Environmental Adjudication serves as the Ultimate Authority in the administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is a Final Order subject to Judicial Review consistent with applicable provisions of IC 4-21.5. Pursuant to IC 4-21.5-5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

**IT IS SO ORDERED this 30th day of April, 2004 in Indianapolis, IN.**

Hon. Mary L. Davidsen