Objection to the Issuance of Significant Source Modification Permit N0. T083-23529-00003
Duke Energy Indiana, Inc.
Edwardsport Generating Station
Edwardsport, Knox County, Indiana
2010 OEA 1nf, (08-A-J-4066)

OFFICIAL SHORT CITATION NAME: When referring to 2010 OEA 1nf cite this case as ***Duke Energy Indiana, Inc.*, 2010 OEA 1nf.**

TOPICS:

dismissal
de novo
air
BACT
CO_2
N_2O
deference
Chevron
Christenson
Clean Air Act (CAA)
subject to regulation
actual control
emissions
pollutant
Massachusetts v. EPA
statutory construction
regulated NSR pollutant
State Implementation Plan (SIP)
greenhouse gases
In Re Deseret Power Electric Cooperative
ejusdem generis
42 U.S.C. §7475
40 C.F.R. 52.21(b)(50)
326 IAC 2-2-1(uu)

PRESIDING JUDGE:
Mary L. Davidsen

ADJUNCT JUDGE:
Catherine Gibbs

PARTY REPRESENTATIVES:

IDEM:	Justin Barrett, Esq.
Petitioners:	Jerome Polk, Esq.; Polk & Associates
	David Bender, Esq., Christa Westerberg, Esq.;
	McGillivray Westerberg & Bender LLC
Respondent:	Larry J. Kane, Esq., Matthew A. Gernand, Esq., Robin L. Babbit, Esq.,
	Gregory A. Neibarger, Esq.; Bingham McHale LLP
	Julie Ezell, Esq.; Duke Energy Indiana, Inc.

ORDER ISSUED:
November 24, 2010

INDEX CATERGORY:
Air

FURTHER CASE ACTIVITY:
[none]

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Duke Energy Indiana, Inc.
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2010 OEA 1nf, (08-A-J-4066)

STATE OF INDIANA	)	BEFORE THE INDIANA OFFICE OF
	)	ENVIRONMENTAL ADJUDICATION
COUNTY OF MARION	)	
IN THE MATTER OF:	)	
	)	
OBJECTION TO THE ISSUANCE OF	)	
OF SIGNIFICANT SOURCE MODIFICATION	)	
NO. T083-23529-00003	)	
DUKE ENERGY INDIANA INC.	)	
EDWARDSPORT GENERATING STATION	)	
EDWARDSPORT, KNOX COUNTY, INDIANA	)	
_____	)	CAUSE NO. 08-A-J-4066
Sierra Club *et al.*,	)	
Petitioners,	)	
Duke Energy Indiana, Inc.,	)	
Permittee/Respondent,	)	
Indiana Department of Environmental Management,	)	
Respondent	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter having come before the Office of Environmental Adjudication (OEA) on Duke Energy Indiana Inc.'s Motion to Dismiss, In Part, the Petition for Review, which pleading is a part of the Court's record; and the Court, being duly advised and having read the Motion to Dismiss, filed on July 17, 2008; Petitioners' Response to Duke Energy Indiana Inc.'s Motion to Dismiss, In Part, the Petition for Review, filed on August 16, 2009; Indiana Department of Environmental Management's Concurrence with Duke Energy Indiana Inc.'s Brief in Support of Motion to Dismiss, In Part, the Petition for Review, filed on August 18, 2008; Petitioners' Reply to Indiana Department of Environmental Management's Concurrence with Duke Energy Indiana Inc.'s Brief in Support of Motion to Dismiss, In Part, the Petition for Review filed on September 17, 2008; Indiana Department of Environmental Management's Reply in Support of Duke Energy Indiana Inc.'s Brief in Support of Motion to Dismiss, In Part, the Petition for Review filed on September 18, 2008; Duke Energy Indiana Inc.'s Reply Brief in Support of Its Motion to Dismiss, In Part, the Petition for Review, filed on September 18, 2008; Petitioners' Notice of Supplemental Authority in Support of Petitioners' Response to Duke Energy Indiana's Motion to Dismiss, In Part, the Petition for Review, filed on November 14, 2008; Duke Energy Indiana Inc.'s Response to Petitioners' Notice of Supplemental Authority filed on December 4, 2008; Duke Energy Indiana Inc.'s Notice of Supplemental Authority for Its Motion to Dismiss, In Part, the Petition for Review filed on December 24, 2008; Petitioners' Response to Duke Energy Indiana Inc.'s Notice of Supplemental Authority for Its Motion to Dismiss, In Part, the Petition for Review filed on January 5, 2008; Petitioners' Second Notice of Supplemental Authority in

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Support of Petitioners' Response to Duke Energy Indiana Inc.'s Motion to Dismiss, In Part, the Petition for Review filed on February 18, 2008; Petitioners' Third Notice of Supplemental Authority in Support of Petitioner's Opposition to Duke Energy Indiana's Motion to Dismiss, In Part, the Petition for Review filed on May 26, 2009; and Duke Energy Indiana Inc.'s Response to Petitioners' Third Notice of Supplemental Authority filed on June 12, 2009; Duke Energy Indiana, Inc.'s Second Notice of Supplemental Authority in Support of Its Motion to Dismiss, In Part, the Petition for Review filed on July 23, 2009; Petitioners' Response to Duke Indiana, Inc's Second Notice of Supplemental Authority in Support of Petitioners' Opposition to Duke Energy Indiana's Motion to Dismiss, in Part, the Petition for Review filed August 21, 2009; Duke Energy Indiana Inc.'s Third Notice of Supplemental Authority in Support of Its Motion to Dismiss, In Part, the Petition for Review filed on December 23, 2009; Petitioners' Response to Duke Energy Indiana Inc.'s Third Notice of Supplemental Authority in Support of Its Motion to Dismiss, In Part, the Petition for Review filed on January 15, 2010; and Duke Energy, Inc.'s Reply to Petitioners' Response to Duke Energy, Inc.'s Third Notice of Supplemental Authority, filed on February 1, 2010, now enters judgment and makes the following findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. On January 25, 2008, the Indiana Department of Environmental Management (IDEM) issued Significant Source Modification No. T083-23529-00003 (the "Permit") to Duke Energy Indiana Inc. (Duke) for its Edwardsport Generating Station (EGS). The Permit allowed the modification of the EGS by the construction of an integrated gasification combined cycle (IGCC) electric generating facility with the retirement of existing generating units and their associated equipment.

2. Sierra Club, Valley Watch, Save the Valley and Citizen Action Coalition (collectively the "Petitioners") filed a Verified Petition for Review and for Stay of Effectiveness on February 12, 2008.

3. On July 17, 2008, Duke filed a Motion to Dismiss, In Part, the Petition for Review. The Motion to Dismiss seeks dismissal of the Petitioners' allegations contained in Issue #4 of the Petition for Review. The Petitioners allege that the Permit is deficient in that it lacks BACT[1] limits for carbon dioxide (CO_2) and nitrous oxide (N_2O).

4. On March 12, 2009, Catherine Gibbs was appointed adjunct Environmental Law Judge in this matter.

5. The U.S. Environmental Protection Agency ("EPA") has not promulgated any National Ambient Air Quality Standards ("NAAQS") for either CO_2 or N_2O. EPA had not promulgated any NAAQS for either CO_2 or N_2O at the time the Permit was issued.

[1] Best available control technology

6. Prior to the issuance of the Permit, the IDEM reviewed Duke's application pursuant to the Prevention of Significant Deterioration (PSD) requirements of 326 IAC 2-2 and determined that the PSD requirements did not apply to CO_2 or N_2O.

CONCLUSIONS OF LAW

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

2. Findings of Fact that may be construed as Conclusions of Law and Conclusions of Law that may be construed as Findings of Fact are so deemed.

3. This office must apply a *de novo* standard of review to this proceeding when determining the facts at issue. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993). Findings of fact must be based exclusively on the evidence presented to the Environmental Law Judge (the ELJ), and deference to the agency's initial factual determination is not allowed. *Id.*; I.C. § 4-21.5-3-27(d). "*De novo* review" means that "all issues are to be determined anew, based solely upon the evidence adduced at that hearing and independent of any previous findings." *Grisell v. Consol. City of Indianapolis*, 425 N.E.2d 247 (Ind. Ct. App. 1981).

4. A Trial Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted tests the legal sufficiency of a claim, not the facts supporting it. *Gorski v. DRR, Inc.*, 801 N.E.2d 642, 644 (Ind.Ct.App. 2003). In reviewing a motion to dismiss, "a court is required to take as true all allegations upon the face of the complaint and may only dismiss if the plaintiff would not be entitled to recover under any set of facts admissible under the allegations of the complaint. This Court views the pleadings in a light most favorable to the nonmoving party, and we draw every reasonable inference in favor of that party." *Huffman v. Indiana Office of Environmental Adjudication, et al*., 811 N.E.2d 806, 814 (Ind. 2004).

5. Duke moves to dismiss Issue #4 raised by the Petitioners in their Petition for Review. Issue #4 alleges that the Permit is deficient because IDEM failed to include BACT limits for CO_2 or N_2O. This issue revolves around the interpretation of 42 U.S.C § 7475(a)(4) which requires a BACT analysis for "each pollutant subject to regulation under this Act."

6. Duke and the IDEM argue that neither CO_2 nor N_2O are subject to regulation under the Clean Air Act (CAA). They argue that the statute is ambiguous and that the Court must defer to the EPA's and IDEM's interpretation that "subject to regulation" means the regulations require "actual control of emissions of that pollutant". In addition, if the Court does not defer to the

agencies' interpretation, the rules of statutory construction dictate that the Court conclude that these pollutants are not regulated.

7. The Petitioners argue that the statute is not ambiguous and that both CO_2 and N_2O are, in fact, regulated under the CAA. CO_2 is subject to regulation because the CAA requires that sources monitor and report on CO_2 emissions. Further, the Petitioners cite the U.S. Supreme Court case, *Massachusetts v. EPA*, 127 S.Ct. 1438 (2007), in which the Supreme Court ruled that CO_2 is an air pollutant and may be subject to regulation under the plain language of the statute and rule. In addition, the Petitioners argue that because N_2O is regulated by Wisconsin through its SIP[2] that this means that N_2O is regulated under the CAA. The Petitioners argue that the record does not support a conclusion that EPA and IDEM have historically interpreted "subject to regulation" to mean actual control.

8. The issue is the interpretation of the words "subject to regulation" contained in 42 U.S.C. § 7475. This statute, in pertinent part, states:

   (a) Major emitting facilities on which construction is commenced. No major emitting facility on which construction is commenced after the date of the enactment of this part [enacted Aug. 7, 1977], may be constructed in any area to which this part applies unless—

   (4) the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this Act emitted from, or which results from, such facility;

9. 40 C.F.R. 52.21(b)(50) defines "regulated NSR pollutant as:

   Regulated NSR pollutant, for purposes of this section, means the following:

   (i) Any pollutant for which a national ambient air quality standard has been promulgated and any constituents or precursors for such pollutants identified by the Administrator (e.g., volatile organic compounds and NO_x are precursors for ozone);
   (ii) Any pollutant that is subject to any standard promulgated under section 111 of the Act;
   (iii) Any Class I or II substance subject to a standard promulgated under or established by title VI of the Act; or
   (iv) Any pollutant that otherwise is subject to regulation under the Act; except that any or all hazardous air pollutants either listed in section 112 of the Act or added to the list pursuant to section 112(b)(2) of the Act, which have not been delisted pursuant to section 112(b)(3) of the Act, are not regulated NSR pollutants unless the listed hazardous air pollutant is also regulated as a

[2] State Implementation Plan

constituent or precursor of a general pollutant listed under section 108 of the Act.

10. 326 IAC 2-2-1(uu) defines "regulated NSR pollutant as:

"Regulated NSR pollutant" means any of the following:

(1) Any pollutant for which a national ambient air quality standard has been promulgated and any constituents or precursors for the pollutants identified by the U.S. EPA.
(2) Any pollutant that is subject to any standard promulgated under Section 111 of the CAA.
(3) Any Class I or II substance subject to a standard promulgated under or established by Title VI of the CAA.
(4) Any pollutant that otherwise is subject to regulation under the CAA, except that any or all hazardous air pollutants either listed in Section 112 of the CAA or added to the list pursuant to Section 112(b)(2) of the CAA, which have not been delisted pursuant to Section 112(b)(3) of the CAA, are not regulated NSR pollutants unless the listed hazardous air pollutant is also regulated as a constituent or precursor of a general pollutant listed under Section 108 of the CAA.

Does the Court owe any deference to IDEM's interpretation of "subject to regulation"?

11. The Supreme Court, in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984), held that an agency's reasonable construction of a statute that had been promulgated as a regulation was entitled to deference by a reviewing court. The Court said in *Christensen v. Harris County*, 529 U.S. 576, 587, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000), "a court must give effect to an agency's regulation containing a reasonable interpretation of an ambiguous statute." The Court held "When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges -- who have no constituency -- have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches." *TVA v. Hill*, 437 U.S. 153, 195 (1978)."

12. The Court further held, in *Christensen*, that "Interpretations such as those in opinion letters -- like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law -- do not warrant *Chevron*-style deference. *Id* at 587. Such interpretations are "entitled to respect", but only to the extent that "those interpretations have the power to persuade." at 587.

13. Additionally, the Court has determined that deference is appropriate especially where the regulation concerns "a complex and highly technical regulatory program," in which the identification and classification of relevant "criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns." *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697, 111 S.Ct. 2524, 2534, 115 L.Ed.2d 604 (1991).

14. Indiana courts have also addressed this issue. "The cardinal rule of statutory construction is to ascertain the intent of the legislature by giving effect to the ordinary and plain meaning of the language used." *Bourbon Mini-Mart, Inc. v. Commissioner, Indiana Department of Environmental Management*, 806 N.E.2d 14, 20 (Ind.Ct.App. 2004). "If the language of a statute is clear and unambiguous, it is not subject to judicial interpretation. Id. However, when the language of a statute is reasonably susceptible to more than one construction, we must construe the statute to determine the apparent legislative intent. Id. If a statute is subject to different interpretations, the interpretation of the statute by the administrative agency charged with the duty of enforcing the statute is entitled to great weight. *Indiana Dep't of Envtl. Mgmt v. Boone County Res. Recovery Sys, Inc.*, 803 N.E.2d 267, 273 (Ind. Ct. App. 2004), trans. denied. However, an agency's interpretation that is incorrect is entitled to no weight. *Noland v. Indiana Family and Soc. Services Admin., Div. of Disability, Aging, and Rehabilitative Services*, 743 N.E.2d 1200, 1203 (Ind. Ct. App. 2001)."

15. In *Indiana-Kentucky Electric v. Commissioner, Indiana Department of Environmental Management*, 820 N.E.2d 771, 781 (Ind. App. 2005), the Court examined whether the OEA had properly interpreted the regulation at issue. The Court concluded in *IKEC* that both IDEM and the OEA had misconstrued the rule.

16. Moreover, the Court held that the OEA had applied the wrong standard of review. In the OEA's order granting IDEM's motion for summary judgment, the presiding Environmental Law Judge stated, "Courts and, by extension, administrative adjudicatory agencies, must give considerable deference to an agency's interpretation of the statute it is charged with enforcing." *Id. at 781*. The Court held this was an error and that the OEA must apply a *de novo* standard of review.

17. It is clear from the above cited cases that the OEA owes no deference to the IDEM's interpretations when reviewing the agency's actions. It is also clear that *reviewing* courts must defer to the agency's interpretation.

18. The OEA concludes that while it may not defer to the IDEM's interpretation, that the IDEM's interpretation is "entitled to respect" to the extent that "those interpretations have the power to persuade."[3] Therefore, OEA may give greater weight to the agency's interpretation (1) where a statute or rule is ambiguous; (2) significant policy concerns are involved; (3) the subject matter concerns highly technical matters where the IDEM's expertise is beneficial;

[3] *Christensen v. Harris County*, 529 U.S. 576, 587, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000).

and (4) the OEA concludes that IDEM's interpretation is consistent with the rules of statutory construction.

Is CO_2 a pollutant subject to regulation?

19. Under Section 821 of Public Law 101-549, Congress required the EPA adopt regulations requiring certain sources of air emissions to monitor and report their emissions of CO_2. These requirements were subsequently promulgated by U.S. EPA as part of 40 C.F.R. Part 75. These requirements have been incorporated by Indiana at 326 IAC 21-1-1, 326 IAC 2-7-1(16) and 326 IAC 2-7-5(1). These regulations are enforceable through administrative, civil and criminal proceedings under the Clean Air Act.

20. The United States Supreme Court, in *Massachusetts v. EPA*, 127 S.Ct. 1438 (2007) held that CO_2 met the definition of an "air pollutant" under the Clean Air Act and that the EPA had the authority to regulate the emission of CO_2 from new motor vehicles. This case arose in 1999 when various organizations petitioned the U.S. EPA to promulgate rules regulating "greenhouse gas emissions from new motor vehicles under § 202 of the Clean Air Act." *Id* at 6. The EPA denied the petition. The reasons the EPA gave for denying the petition were "(1) that contrary to the opinions of its former general counsels, the Clean Air Act does not authorize EPA to issue mandatory regulations to address global climate change . . .; and (2) that even if the agency had the authority to set greenhouse gas emission standards, it would be unwise to do so at this time . . ." *Id* at 8. Section 202 of the CAA gives the EPA the authority to regulate the emissions from cars which in the Administrator's judgment "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U. S. C. § 7521(a)(1). The Court held that CO_2 is an "air pollutant" as this term is defined under the CAA and that the EPA had the authority to regulate it. Further, the Court concluded that the EPA's determination that regulation "would be unwise" was not based in statutory language and that this determination was "arbitrary and capricious . . . or otherwise not in accordance with law." The Court held "We need not and do not reach the question whether on remand EPA must make an endangerment finding, or whether policy concerns can inform EPA's actions in the event that it makes such a finding. Cf. *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843–844 (1984). We hold only that EPA must ground its reasons for action or inaction in the statute." at 1470. Thus, while the Supreme Court found that CO_2 was an air pollutant, it remanded the issue of whether CO_2 is a danger to public health or welfare and should be regulated to the EPA.

21. On December 15, 2009, the U.S. EPA issued its Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act (74 Fed. Reg. 66496, December 15, 2009). The Administrator found that "elevated concentrations of greenhouse gases in the atmosphere may reasonably be anticipated to endanger the public welfare of current and future generations." 74 Fed. Reg. 66496, 66516. However, the Administrator noted that this finding does not change U.S. EPA's current position that "well-mixed greenhouse gases" are not subject to regulation. 74 Fed. Reg. 66496, 66516 n. 17.

22. The IDEM argues that, historically, it has not considered CO_2 and N_2O to be "subject to regulation." The Environmental Appeals Board (the "EAB" or "Board") *In Re Deseret Power Electric Cooperative*, PSD Appeal No. 07-03, Slip Op. (EAB Nov. 13, 2008) (hereinafter "Deseret") rejected the EPA's argument that its authority was constrained by the historical agency interpretation. The Board rejected the same arguments made in this case by Duke and IDEM that various documents establish that EPA has clearly interpreted "subject to regulation" to mean actual control of emissions. However, while the Board rejected EPA's argument that its interpretation was consistent with its historical interpretation, the Board did not conclude that the interpretation was incorrect.

23. In response to this decision, the Administrator of the U.S. EPA caused a Notice of Issuance of the Administrator's Interpretation to be published in the Federal Register on December 31, 2008. The Notice states, "As of the date of the memorandum, EPA interprets this definition of ''regulated NSR pollutant'' to exclude pollutants for which EPA regulations only require monitoring or reporting but include all pollutants subject to a provision in the Act or regulation adopted by EPA under the Act that requires actual control of emissions of that pollutant." 73 Fed. Reg. 80300 at 80301.

24. The Petitioners cite to a case from the Superior Court of Fulton County, Georgia, in which the trial court found that CO_2 is subject to regulation and remanded a PSD permit back to the state environmental agency. The trial court's decision was subsequently reversed by the Court of Appeals of Georgia.

25. It is clear that the current state of affairs relating to whether emissions controls should be placed on CO_2 is evolving on a nationwide level. There has been at least one decision by the EAB that rejects the very arguments made by Duke in this case. However, it is clear that EPA and IDEM have not conceded that CO_2 is a pollutant subject to regulation. While the EAB has determined that EPA did not meet its burden of proving that it has historically interpreted "subject to regulation" to mean "actual control of emissions of that pollutant", there is still the question of the correct interpretation of this phrase.

26. It is OEA's province to determine the correct interpretation of the statute. "The cardinal rule of statutory construction is to ascertain the intent of the legislature by giving effect to the ordinary and plain meaning of the language used." *Bourbon Mini-Mart, Inc. v. Commissioner, Indiana Department of Environmental Management*, 806 N.E.2d 14, 20 (Ind.Ct.App. 2004). The OEA concludes that the regulatory phrase "subject to regulation" is ambiguous.

27. Having determined that the statute is ambiguous, the Court may apply other rules of statutory construction.

28. The doctrine of *ejusdem generis* applies in this instance. The Indiana Supreme Court has held that rule applies "when a list (or enumeration) of words of specific and limited meaning

are followed by words of more general and comprehensive meaning. The general words are then construed as including only those persons, places, or things that are like those designated by the specific words." *600 Land, Inc. v. Metro. Bd. of Zoning Appeals*, 889 N.E.2d 305, 310 (Ind. 2008).

29. The first three categories of regulated NSR pollutants listed in the definition of 40 C.F.R. § 52.21(b)(50) are similar in an important respect. They all involve the development of substantive standards for the control of emissions of the specified pollutants, either through the development of a NAAQS, a new source performance standard ("NSPS") or through usage constraints imposed under the stratospheric ozone protection program. Moreover, each of the three control standards requires a formal and comprehensive agency rulemaking before the pollutant can be regulated.

30. Because each of the first three categories describes pollutants that require substantive standards, limitations or similar provisions for the control of emissions and have become subject to emissions controls through a formal rulemaking approach, it is reasonable to conclude that the meaning of the fourth, more general category must be interpreted and applied consistent with the first three categories, in accordance with the doctrine of *ejusdem generis.* This Court concludes that *ejusdem generis* should be applied in interpreting the meaning of "regulated NSR pollutant." Thus, the fourth category must be interpreted to include only those additional pollutants for which substantive standards, limitations or similar provisions for the control of emissions are required under the CAA. As the regulations require only monitoring for CO_2, the fourth category does not include CO_2. The OEA concludes that the rules of statutory construction support an interpretation that "subject to regulation" only applies where emissions are actually controlled and not just monitored.

31. Another one of the rules of statutory construction is, "If a statute is subject to interpretation, our main objectives are to determine, effect, and implement the intent of the legislature in such a manner so as to prevent absurdity and hardship and to favor public convenience." *State v. Evans*, 790 N.E.2d 558, 560 (Ind. App., 2003).

32. In trying to determine what the legislative intent was, the Supreme Court in *Shell Oil v. Myer*, 705 N.E.2d 962 (Ind. 1998), held that one can look to the history of an agency's administrative interpretation. The Court stated:

> However, administrative interpretation may provide a guide to legislative intent. "A long adhered-to administrative interpretation dating from the legislative enactment, with no subsequent change having been made in the statute involved, raises a presumption of legislative acquiescence which is strongly persuasive upon the courts." *Board of Sch. Trustees v. Marion Teachers Ass'n*, 530 N.E.2d 309, 311 (Ind. Ct. App. 1988); accord *Baker v. Compton*, 247 Ind. 39, 42, 211 N.E.2d 162, 164 (1965).

at 976-977.

33. On October 16, 2009, Lisa P. Jackson, U.S. EPA Administrator, issued her Order Partially Denying and Partially Granting Petition for Objection to Permit in the Matter of BP Products North America, Inc., Whiting Business Unit, Permit No. 089-25488-00453 (the BP Order). This was an order responding to the Petitioners'[4] request that the Administrator object to the issuance of a state operating permit to BP Products North America, Inc. One of the issues in that case is the same as the issue raised by the motion for summary judgment here. The Administrator determined that the IDEM's decision not to include CO_2 and N_2O was consistent with (1) U.S. EPA's current interpretation and (2) with IDEM's past practices and policy. Further, she stated that EPA has not precluded IDEM from interpreting "pollutant subject to regulation" as meaning only those pollutants that are subject to active control of emissions. The Administrator denied the Petitioners' petition saying,

> Thus, since IDEM has articulated and supported an interpretation of its regulations that is permissible under the Clean Air Act and consistent with the interpretation of the same language that EPA itself is following at this time, I deny the petition with respect to argument that the permit must contain emission limitations for CO_2 and other greenhouse gases. Petitioners have not demonstrated that carbon dioxide, methane, nitrous oxides or other greenhouse gases are currently subject to a statutory or regulatory provision that requires actual control of emissions of these substances.

34. IDEM's decision regarding BACT as it applies to CO_2 and N_2O is consistent with its past practices. The IDEM has consistently interpreted "subject to regulation" to apply to those pollutants for which emissions are actually controlled.

35. Given the highly technical nature of this controversy and the significant policy concerns on both the state and federal level and the IDEM's historical interpretation, the OEA concludes that the IDEM's interpretation is "entitled to respect".[5]

36. Duke and IDEM have presented sufficient evidence that persuades the ELJ that dismissal of Issue #4 as it relates to CO_2 is proper. The motion to dismiss Issue #4 as it relates to CO_2 should be and is **GRANTED.**

<u>N_2O is not subject to regulation.</u>

37. The Petitioners rely solely on the fact that the State of Wisconsin has included N_2O in its State Implementation Plan as their support for their contention that N_2O is subject to regulation.

[4] Sierra Club is a Petitioner in both the BP matter and in this matter.
[5] *Christensen v. Harris County,* 529 U.S. 576, 587, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000)

38. This argument is not persuasive. While these requirements are enforceable in Wisconsin, it is clear that Wisconsin's requirements are neither applicable nor enforceable in Indiana. The fact that a pollutant may be regulated in one state does not transform that pollutant into one that must be regulated nationwide or in other individual states.

39. IDEM does not have any statutory or regulatory authority that limits or regulates the emission of N_2O. Further, IDEM has consistently interpreted "pollutant subject to regulation" as meaning a pollutant for which active control of emissions is required.

40. There is no set of facts under which the Petitioners would be able to claim relief on their allegation that IDEM erred in issuing the Permit because a BACT analysis was not performed for N_2O.

41. The motion to dismiss Issue #4 as it relates to N_2O should be and is **GRANTED.**

ORDER

AND THE COURT, being duly advised, hereby **ORDERS, ADJUDGES AND DECREES** that Duke Energy Indiana Inc.'s Motion to Dismiss, In Part, the Petition for Review is **GRANTED.**

You are further notified that pursuant to provisions of I.C. § 4-21.5-7-5, the Office of Environmental Adjudication serves as the ultimate authority in administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is an order subject to further review consistent with applicable provisions of I.C. § 4-21.5 and other applicable rules and statutes.

IT IS SO ORDERED this 24th day of November, 2010 in Indianapolis, IN.

Hon. Catherine Gibbs
Adjunct Environmental Law Judge

Hon. Mary Davidsen
Chief Environmental Law Judge