Objection to the Issuance of New Construction FESOP Permit No. F133-28725-00003
Putnam County Ethanol, LLC
Cloverdale, Putnam County, Indiana; consolidated with
Objection to the Issuance of New Construction FESOP Permit No. 169-28809-00068,
POET Biorefining – North Manchester, LLC (10-A-J-4374)
North Manchester, Wabash County, Indiana
2011 OEA 1, (10-A-J-4367)

OFFICIAL SHORT CITATION NAME: When referring to 2011 OEA 1 cite this case as
***Putnam County Ethanol*, 2011 OEA 1.**

TOPICS:

summary judgment
de novo
air
statutory interpretation
deference
potential to emit
fugitive emissions
major source
major stationary source
ethanol
fuel grade
chemical process plant
regulated pollutants
particulate matter
prevention of significant deterioration (PSD)
Standard Industrial Classification Manual (SIC)
Clean Air Act (CAA)
State Implementation Plan (SIP)
Cinergy
Chevron
Christensen
326 IAC 2-7-1(22)(B)(xx)
326 IAC 2-2-1(gg)(1)(U)

PRESIDING JUDGE:
Catherine Gibbs

PARTY REPRESENTATIVES:
IDEM: Justin D. Barrett, Esq.
Petitioner: Colin C. O'Brien, Esq.; Natural Resources Defense Council
Respondent: Terri Czajka, Esq.; Ice Miller LLC

ORDER ISSUED:
January 11, 2011

INDEX CATEGORY:
Air

FURTHER CASE ACTIVITY:
[none]

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2011 OEA 1, (10-A-J-4367)

STATE OF INDIANA	)	BEFORE THE INDIANA OFFICE OF
	)	ENVIRONMENTAL ADJUDICATION
COUNTY OF MARION	)	
IN THE MATTER OF:	)	
	)	
OBJECTION TO THE ISSUANCE OF	)	
NEW CONSTRUCTION FESOP PERMIT	)	
NO. F133-28725-00003	)	
PUTNAM COUNTY ETHANOL LLC	)	
CLOVERDALE, PUTNAM COUNTY, INDIANA	)	
_____	)	CAUSE NO. 10-A-J-4367
Natural Resources Defense Council,	)	
Petitioner,	)	
Putnam County Ethanol LLC,	)	
Permittee/Respondent,	)	
Indiana Department of Environmental Management,	)	
Respondent	)	
	)	
OBJECTION TO THE ISSUANCE OF FIRST	)	
SIGNIFICANT REVISION TO FESOP PERMIT	)	
NO. 169-28809-00068	)	
POET BIOREFINING – NORTH MANCHESTER LLC	)	
NORTH MANCHESTER, WABASH CO., INDIANA	)	
_____	)	CAUSE NO. 10-A-J-4374
Natural Resources Defense Council,	)	
Petitioner,	)	
Poet Biorefining – North Manchester LLC,	)	
Permittee/Respondent,	)	
Indiana Department of Environmental Management,	)	
Respondent	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

This matter came before the Office of Environmental Adjudication (hereinafter referred to as the "Court" or "OEA") on the Permittees' Motion for Summary Judgment, which pleading is a part of the Court's record; and the Court, being duly advised and having read the motion, response, reply and evidence, now enters the following findings of fact, conclusions of law and final order.

Objection to the Issuance of New Construction FESOP Permit No. F133-28725-00003
Putnam County Ethanol, LLC
Cloverdale, Putnam County, Indiana; consolidated with
Objection to the Issuance of New Construction FESOP Permit No. 169-28809-00068,
POET Biorefining – North Manchester, LLC (10-A-J-4374)
North Manchester, Wabash County, Indiana
2011 OEA 1, (10-A-J-4367)

Summary of Decision

The issue in this case is whether fuel-grade ethanol plants are "chemical process plants" and are, therefore, "major sources" (as defined by 326 IAC 2-7-1(22)(B)(xx)) or "major stationary sources" (as defined by 326 IAC 2-2-1(gg)), subject to the prevention of significant deterioration (PSD) requirements. If the plants are chemical process plants[1], they are allowed to emit up to 100 tons per year (tpy) of regulated pollutants before being subject to Prevention of Significant Deterioration (PSD)[2] requirements. Further, if the plants are chemical process plants, then fugitive emissions must be considered in determining emissions or potential emissions. The presiding ELJ finds that the term "chemical process plants" includes fuel grade ethanol plants and enters judgment in favor of the Petitioner.

Case Summary

1. On March 26, 2010, the Indiana Department of Environmental Management (the IDEM) issued Federally Enforceable State Operating Permit No. F133-28725-00003 (the "Putnam County Permit") to Putnam County Ethanol LLC (Putnam County). The Natural Resource Defense Council (the Petitioner) filed its petition for review of this decision on April 13, 2010. This matter was assigned Cause No. 10-A-J-4367.

2. On May 5, 2010, the Indiana Department of Environmental Management (the IDEM) issued Federally Enforceable State Operating Permit No. F169-28809-00068 (the "POET Permit") to Poet Biorefining – North Manchester LLC (POET). The Natural Resource Defense Council (the Petitioner) filed its petition for review of this decision on May 24, 2010. This matter was assigned Cause No. 10-A-J-4374.

3. These causes were consolidated under Cause No. 10-A-J-4367 with the consent of all parties on June 30, 2010.

4. The parties moved for summary judgment on or about July 14, 2010. Briefing was concluded on November 22, 2010.

[1] There has been no contention that these plants fall into any other listed category other than "chemical process plants".

[2] "Prevention of significant deterioration program" or "PSD program" means a major source preconstruction permit program that has been approved by the U.S. EPA and incorporated into the SIP to implement the requirements of 40 CFR Part 51.166 or the program in 40 CFR Part 52.21.

Objection to the Issuance of New Construction FESOP Permit No. F133-28725-00003
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POET Biorefining – North Manchester, LLC (10-A-J-4374)
North Manchester, Wabash County, Indiana
2011 OEA 1, (10-A-J-4367)

FINDINGS OF FACT

1. Indiana's State Implementation Plan was conditionally approved by the U.S. EPA on March 3, 2003. 68 Fed. Reg. 9892 (Mar. 3, 2003). This approval became effective on April 2, 2003. *Id*. As a result of the approval, the state PSD rules at 326 IAC 2-2 *et seq*. are federally enforceable under the CAA.

2. Particulate matter (PM) is a "regulated pollutant" for purposes of the PSD program. 42 U.S.C. § 7473; 326 IAC 2-2-1, 2-2-6.

3. Fuel grade ethanol plants are classified as "chemical process plants" by the 1987 Standard Industrial Classification Manual.

Putnam County Ethanol LLC

4. On March 26, 2010, the Indiana Department of Environmental Management (the IDEM) issued Federally Enforceable State Operating Permit No. F133-28725 (the "Putman County Permit") to Putnam County Ethanol LLC (Putnam County). The Natural Resource Defense Council (the Petitioner) timely filed its petition for review of this decision on April 13, 2010. The Putnam County Ethanol plant will produce fuel-grade ethanol.

5. The Petitioner's members reside and recreate in Putnam County. Some of these members have respiratory conditions that make them sensitive to air pollution. Further, the Petitioner is a membership organization with a core mission that includes protesting air pollution.

6. The Putnam County Permit specifies that the Putnam County plant is not one of 28 listed source categories in 326 IAC 2-7-1(22)(B)(xx)) or 326 IAC 2-2-1(gg).

7. The Putnam County plant is located in Putnam County, which is an attainment area.[3]

8. The Putnam County Permit limits emissions of particulate matter (PM) and other regulated pollutants to 250 tons per year and does not take into account fugitive emissions in calculating potential to emit for purposes of determining whether the Plant is a major stationary source or major emitting facility.

9. Pursuant to its Permit, the Putnam County plant has the potential to emit 78.48 tpy of PM without fugitive emissions. This plant has the potential to emit 123.25 tpy of PM counting fugitive emissions.

[3] Attainment areas are those areas which the U.S. EPA has determined meet the National Ambient Air Quality Standards (NAAQS) for certain air pollutants.

10. The Putnam County plant was previously operated by ALTRA Indiana LLC from October 4, 2004 until June 9, 2009. The FESOP permit was revoked at the request of ALTRA when the plant ceased operations. This previous FESOP permit specified that the plant was one of 28 listed source categories, limited the plant's potential to emit PM to less than 100 tpy, and included fugitive emissions in the calculation of the plant's potential to emit PM.

POET Biorefining-North Manchester LLC

11. POET Biorefining-North Manchester LLC (POET) owns and operates an ethanol plant in North Manchester Indiana. On May 5, 2010, the Indiana Department of Environmental Management (the IDEM) issued First Significant Revision No. 169-28809-00068 to Federally Enforceable State Operating Permit No. F169-28809-00068 (the "POET Permit Revision") to POET. The Natural Resource Defense Council (the Petitioner) timely filed a petition for review on May 24, 2010. The plant produces fuel-grade ethanol.

12. The Petitioner's members reside and recreate in Wabash County. Some of these members have respiratory conditions that make them sensitive to air pollution. Further, the Petitioner is a membership organization with a core mission that includes protesting air pollution.

13. The POET Permit Revision specifies that the POET Plant is not one of the 28 listed source categories.

14. The POET plant is located in Wabash County, which is an attainment area.

15. The POET Permit Revision limits emissions of particulate matter (PM) and other regulated pollutants to 250 tons per year and did not consider fugitive emissions in determining whether the Plant is a major stationary source or major emitting facility. Section D.1.4 of the Permit states "Compliance with these PM limits in conjunction with the PM PTE from all other emission units shall limit the PM emissions from the entire source to less than 250 tons per year and therefore, render the requirements of 326 IAC 2-2 (PSD) not applicable. Combined with the PM10 and PM2.5 emissions from other emission units, the PM10 and PM2.5 emissions from the entire source are limited to less than 100 tons/yr. Therefore, the requirements of 326 IAC 2-7 (Part 70 Program) and 326 IAC 2-2 (PSD) are not applicable."

16. Pursuant to its Permit Revision, the POET Plant has the potential to emit 50.19 tpy of PM without fugitive emissions and 98.86 tpy of PM including fugitive emissions.

17. IDEM initially issued New Construction and FESOP No. F169-24515-00068 to POET on August 30, 2007. The August 30, 2007 POET permit stated that this plant does not fall into one of 28 listed source categories[4], limited the plant's potential to emit particulate matter (PM) to less than 100 tpy, and included fugitive emissions in the calculation of the plant's potential to emit PM. While the permit states that the plant does not fit into one of the source categories, the Technical Support Document states that this type of operation is in one of the twenty-eight (28) listed source categories under 326 IAC 2-2.[5] Section D.1.4 of this Permit states, "Combined with the PM/PM10 emissions from other emission units, the PM/PM10 emissions from the entire source are limited to less than 100 tons/yr. Therefore, the requirements of 326 IAC 2-7 (Part 70 Program) and 326 IAC 2-2 (PSD) are not applicable."

Applicable Law

The Office of Environmental Adjudication ("OEA") has jurisdiction over the decisions of the Commissioner of the IDEM and the parties to this controversy pursuant to I.C. § 4-21.5-7-3.

This office must apply a *de novo* standard of review to this proceeding when determining the facts at issue. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993). Findings of fact must be based exclusively on the evidence presented to the ELJ, and deference to the agency's initial factual determination is not allowed. *Id.*; I.C. § 4-21.5-3-27(d). Further, OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Envtl. Adjud.*, 811 N.E.2d 806, 809 (Ind. 2004) (appeal of OEA review of NPDES permit); *see also* I.C. § 4-21.5-3-14; I.C. § 4-21.5-3-27(d).

The OEA may enter judgment for a party if it finds that "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits and testimony, if any, show that a genuine issue as to any material fact does not exist and that the moving party is entitled to judgment as a matter of law." I.C. § 4-21.5-3-23. The moving party bears the burden of establishing that summary judgment is appropriate. All facts and inferences must be construed in favor of the non-movant. *Gibson v. Evansville Vanderburgh Building Commission, et al.*, 725 N.E.2d 949 (Ind. Ct. App. 2000). When the moving party sets out a prima facie case in support of the summary judgment, the burden shifts to the non-movant to establish a factual issue. All evidence must be construed in favor of the opposing party, and all doubts as to the existence of a material issue must be resolved against the moving party. *City of North Vernon v. Jennings Northwest Regional Utilities*, 829 N.E.2d 1, (Ind. 2005), *Tibbs v. Huber, Hunt & Nichols, Inc.*, 668 N.E.2d 248, 249 (Ind. 1996). "The fact that both parties requested summary

[4] Exhibit 10 to NRDC's Motion for Summary Judgment, New Construction and Federally Enforceable State Operating Permit No. 169-24515-00068, page 8 of 101.

[5] Exhibit 11 to NRDC's Motion for Summary Judgment, Technical Support Document for a New Source Review and Federally Enforceable State Operating Permit for POET Biorefining – North Manchester, page 5 of 21; page 7 of 21; page 10 of 21.

judgment does not alter our standard of review. Instead, we must separately consider each motion to determine whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law." *Laudig v. Marion County Bd. of Voters Registration*, 585 N.E.2d 700 (Ind. Ct. App. 1992) at 703-704.

The Petitioner asserts that it has standing to file the petition for review in this cause. The Court of Appeals, in *Save the Valley, Inc. v. Indiana-Kentucky Electric Corp.*, 820 N.E.2d 677 (Ind. Ct. App. 2005), *aff'd on reh'g*, 824 N.E.2d 776 (2005), *trans denied*. adopted the test for associational standing as set out in *Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 97 S. Ct. 2434, 2442, 53 L. Ed. 2d 383 (1977)*. In that case, the United States Supreme Court concluded that an association has standing to sue on behalf of its members when: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt* at 344.

This case requires the ELJ to interpret the term "chemical process plant" as it is used in 326 IAC 2-7-1(22)(B)(xx) and 326 IAC 2-2-1(gg) [6]. For purposes of determining whether the Prevention of Significant Deterioration (PSD) requirements apply to a source, 326 IAC 2-2-1(gg) defines "major stationary source" as either (1) one of any listed category of stationary source that emits or has the potential to emit more than 100 tons per year (tpy) of any NSR[7] pollutant or (2) a source that has the potential to emit more than 250 tpy of any regulated NSR pollutant. 326 IAC 2-2-1(gg)(1)(U) includes "chemical process plants" as one of the 28 listed source categories to which the PSD requirements apply if the source has the potential to emit more than 100 tpy of any regulated NSR pollutant.

Any "major source" as defined in 326 IAC 2-7-1(22) must obtain a Part 70 Permit. In pertinent part, the definition of a "major source" is any stationary source which directly emits or has the potential to emit more than 100 tpy of any regulated air pollutant. The pertinent portion of this rule states, "for the purposes of defining major source in clause (B) or (C), a stationary source or group of stationary sources shall be considered part of a single industrial grouping if all of the pollutant emitting activities at the source or group of stationary sources on contiguous or adjacent properties belong to the same major group (that is, all have the same two (2) digit code) as described in the Standard Industrial Classification Manual, 1987." Fugitive emissions will not be considered in determining whether a source is a major stationary source unless the source is one of the listed categories of stationary sources. Chemical process plants" is one of the 28 listed source categories under 326 IAC 2-7-1(22)(B)(xx).

[6] As of October 1, 2010, the definition is found in 326 IAC 2-2-1(ff).
[7] New source review.

"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)."

The Permittee and the IDEM argue that the ELJ must defer to the IDEM's interpretation of this term. 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)."

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.

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).

However, it is clear that the OEA must conduct a *de novo* review of all proceedings before it. *Indiana Dep't of Natural Res. V. United Refuse Co., Inc.*, 615 N.E.2d 100, 104 (Ind. 1993); *Ind.-Ky. Elec.Corp. v. Ind. Dep't. of Envtl. Mgmt.*, 820 N.E.2d 771 (Ind. Ct. App. 2005). The Court in *Ind.-Ky*. specifically held that the OEA's conclusion that it must defer to IDEM's interpretation was an error.

In *Ind.-Ky. Elec.Corp. v. Ind. Dep't. of Envtl. Mgmt.*, 820 N.E.2d 771 (Ind. Ct. App. 2005), the parties disagreed on the interpretation of a rule. Indiana-Kentucky Electric Corporation (IKEC) sought a waiver from the IDEM regarding the operation of air monitors near one of IKEC's plants. The IDEM denied the waiver based on its policy that monitors must be maintained within ten (10) kilometers of the plant. The Court found that the IDEM and OEA had misconstrued the rule and that the rule did not require monitors within 10 kilometers of a facility. Further, the Court found that the policy that IDEM sought to require compliance with a policy that had not been either properly promulgated as a rule or been published as a non rule policy document under I.C. § 13-14-1-11.5 and that IDEM was improperly requiring compliance with an invalid rule.

Under the Clean Air Act, each state must develop and implement state implementation plans (SIPs) that allow for the enforcement and achievement of national ambient air quality standards (NAAQS) set by the United States Environmental Protection Agency (U.S. EPA) for certain regulated pollutants. 42 U.S.C. § 7410(a)(1). A SIP is submitted to the EPA, which may approve, conditionally approve, or disapprove the SIPs in full or in part. *Sierra Club v. United States EPA*, 314 F.3d 735, 737.

Indiana's regulations require that modifications to the rules must be incorporated into the SIP. 326 IAC 2-2-1(pp). Further, the Court in *Sierra Club v. Indiana-Kentucky Elec. Corp.*, 716 F.2d 1145, 1152 (7th Cir. 1983) held that "modifications or revisions must be approved by the EPA to become effective."

Indiana's SIP was conditionally approved by the U.S. EPA on March 3, 2003. 68 Fed. Reg. 9892 (Mar. 3, 2003). This approval became effective on April 2, 2003. *Id.* As a result of the approval, the state PSD rules at 326 IAC 2-2 *et seq*. are federally enforceable under the CAA.

In May 2007, the U.S. EPA revised its rules to exclude "ethanol production facilities that produce ethanol by natural fermentation" from the definition of "chemical process plants". 72 Fed. Reg. 24077. Prior to this rule, the U.S. EPA distinguished between ethanol production facilities depending on whether the facility produced ethanol fuel or ethanol fit for human consumption. Those facilities which produced ethanol fuel fell under the definition of "chemical process plants"; those that produced ethanol fit for human consumption did not. The IDEM has not revised its rules to include this provision.

The U.S. District Court for the Southern District of Indiana, Indianapolis Division, recently reversed a jury decision against an electric company, in *United States v. Cinergy Corp.*, Nos. 09-3344, 09-3350, 09-3351, slip op. (7th Cir. Oct. 12, 2010). The jury found that the company had violated the law when it modified its plant in Wabash, Indiana without first seeking a permit for such modifications. At the time of the modifications, the standard that was incorporated into Indiana's SIP would have allowed the modifications without obtaining a permit. However, at the same time, federal law would have required that the company obtain a permit before making the modifications. The District Court's ruling hinged on whether amendments made to federal law, but not yet incorporated into Indiana's SIP at the time of the alleged modifications to the plant, were controlling. The Court ruled that the provisions of Indiana's State Implementation Plan (SIP) in effect at the time of the plant modifications were the appropriate provisions to apply in this case. The Court stated, in referring to U.S. EPA's approval of the Indiana SIP, "It [U.S. EPA] should have disapproved it; it didn't; but it can't impose the good standard on a plant that implemented the bad when the bad one was authorized by a state implementation plant that EPA had approved." at 8.

CONCLUSIONS OF LAW

1. The OEA has subject matter jurisdiction to hear the petitions for review as the petitions for review request review of a decision made by the IDEM Commissioner. Further, the Court concludes that the petitions were timely filed.

2. This office must apply a *de novo* standard of review to this proceeding when determining the facts at issue. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993). Findings of fact must be based exclusively on the evidence presented to the ELJ, and deference to the agency's initial factual determination is not allowed. *Id.;* I.C. § 4-21.5-3-27(d).

3. The Petitioner argues that it has standing to bring this action. Neither the Permittee nor the IDEM have questioned this. To the extent that the Permittee-Respondent and IDEM have not conceded that the Petitioner has standing to file its petition for review, the Indiana Court of Appeals has recognized associational standing in *Save the Valley, Inc. v. Indiana-Kentucky Electric Corp.*, 820 N.E.2d 677 (Ind. Ct. App. 2005), *aff'd on reh'g*, 824 N.E.2d 776 (2005), *trans denied*. The Petitioner has alleged sufficient facts to establish that its members are aggrieved or adversely affected; that the Petitioner's interest in this proceeding are directly related to its purpose as an association, including combating air pollution; and that the relief requested by the Petitioner does not require the participation by any of the individual members. Therefore, the Petitioner has associational standing to file this petition for review.

4. Permittee/Respondent argues that the Petitioner has waived its right to challenge the issuance of the significant revision to the POET permit because the Petitioner did not challenge the issuance of the original permit. However, the ELJ finds no basis for such an argument. There was a significant revision to the original permit and inconsistencies between the Permit and the Technical Support Document about whether IDEM classified the POET plant as one of 28 listed source categories. The revision and inconsistencies are sufficient to reopen this issue to review.

5. 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.

6. 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."[8] 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; and (4) the OEA concludes that IDEM's interpretation is consistent with the rules of statutory construction.

7. However, in this case, the ELJ concludes that the agency's interpretation is not entitled to any weight as the ELJ finds that (1) the rule is unambiguous; (2) to the extent that there is any ambiguity, there are no significant policy concerns as demonstrated by the fact that the IDEM changed its policy regarding this issue on no basis other than the U.S. EPA rule amendment; (3) this issue can be resolved by applying the plain and ordinary language of the rule and does not require the assistance of expert testimony; and (4) the IDEM improperly relied upon an unpromulgated rule.

8. Further, the case law relied upon by the IDEM and the Permittee/Respondent is neither persuasive nor relevant. The presiding ELJ issued the decision in *In re: Objection to the Issuance of Part 70 Operating Permit No. T-137-6928-00011 for Joseph E. Seagram & Sons, Inc., Ripley County, Indiana*, 2004 OEA 58, (03-A-J-3003) and found that the OEA should defer to the IDEM. However, since that time, there have been numerous decisions issued in which the OEA has determined that deference is not proper.[9] Moreover, the holdings in some of the cases cited in support of the Respondents' arguments are misconstrued.

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

[9] All decisions issued by the OEA in the last several years contain an explicit statement that the OEA will not defer to the IDEM's interpretation. In particular, the OEA found that the IDEM's interpretation was mistaken in the several cases, including, but not limited to: *IDEM v. Heinhold,* 2007 OEA 70; *Bigfoot 101 ELTF,* 2007 OEA 139; *GasAmerica #45*, 2008 OEA 83.

9. For the following reasons, the presiding ELJ concludes that fuel grade ethanol plants are "chemical process plants". The presiding ELJ further concludes that deference to IDEM's interpretation is improper.

10. The rule is clear that fuel grade ethanol plants are "chemical process plants". The first reason for this conclusion is the plain and ordinary language of the rule. Ethanol is a chemical. A plant that processes ethanol is a chemical process plant.

11. Second, 326 IAC 2-7-1(22) is clear that the 1987 Standard Industrial Classification Manual shall be used to define the major group into which the facility falls. While the use of SIC classifications in other areas of the rule may not be binding upon the interpretation of this term, it's inclusion may be indicative of the Indiana Air Pollution Control Board's ("APCB") intent in adopting the rule.

12. Further, IDEM's current interpretation of this term is inconsistent with its previous interpretation. The IDEM had initially classified the Putnam County plant as a chemical process plant. The only reason given by the IDEM for reclassifying this plant was the change in the federal rule, which is not binding upon the IDEM.

13. The 7th Circuit Court, in *Cinergy Corp.*, has made it clear that IDEM cannot change its interpretation of the rule simply because the U.S. EPA changed its rule. In this instance, IDEM's failure to revise its SIP to include the exception found in the federal rule, excluding fuel grade ethanol plants from the classification of chemical process plants, is fatal to its argument that it must or can rely on the U.S. EPA's interpretation.

14. The APCB did not promulgate any revisions to the rule nor did IDEM ask U.S. EPA to approve any revisions to the Indiana SIP. Further, the IDEM did not publish a non rule policy document in accordance with I.C. § 13-14-1-11.5 in which it determined that fuel grade ethanol plants should no longer be considered chemical process plants. IDEM improperly sought to require compliance with a rule that had not been either properly promulgated or been published as a non rule policy document.

15. There are no genuine issues of material fact in this matter. Summary judgment in the Petitioner's favor is appropriate.

FINAL ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Natural Resource Defense Council's Motion for Summary Judgment is **GRANTED.** Putnam County Ethanol LLC's and POET Biorefining-North Manchester LLC's Motion for Summary Judgment is **DENIED.** Judgment is entered in favor of the Petitioner.

IT IS THEREFORE ORDERED, as follows:

1. The Federally Enforceable State Operating Permit, Permit No. F133-28725-00003, issued to Permittee-Respondent Putnam County Ethanol, LLC ("Putnam County") on March 26, 2010, and the Significant Permit Revision issued to Permittee-Respondent POET Biorefining-North Manchester, LLC ("POET") on May 5, 2010, Significant Permit Revision NO. 169-28809-00068 are hereby vacated and remanded to Respondent, Indiana Department of Environmental Management for review in compliance with the instructions contained in paragraph 2 below.

2. The IDEM shall not issue or approve significant revisions or preconstruction or operating permits to either Permittee-Respondent, Putnam County or Permittee-Respondent, POET unless such permits and supporting analyses comply with the following instructions.
   a) The permits shall establish the potential to emit PM from the Putnam County and POET plants to less than 100 tons per 12 consecutive month period, including fugitive emissions, and list the plants as one of the 28 listed sources under 326 IAC 2-7-1(22) and 326 IAC 2-2-1(gg); or
   b) The permits shall reclassify the Putnam County and POET plants as "major emitting facilities" and include appropriate measures and associated numeric emissions limits, and all other requirements associated with PSD, as applicable.

3. IDEM, Putnam County and POET shall take all other steps necessary to ensure that permits for the plants are issued in accordance with applicable law.

You are hereby further notified that pursuant to provisions of I.C. § 4-21.5-7-5, the Office of Environmental Adjudication serves as the Ultimate Authority in the administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is a Final Order subject to Judicial Review consistent with applicable provisions of I.C. § 4-21.5. Pursuant to I.C. § 4-21.5-5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

IT IS SO ORDERED this 11th day of January 2011 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge