

**Objection to Issuance of First Minor Revision Permit No. 053-30294-00062 to
New Source FESOP Operating Permit No. F053-29180-00062
Central Indiana Ethanol LLC
Marion, Grant County, Indiana, (11-A-J-4477)**

OFFICIAL SHORT CITATION NAME: When referring to 2011 OEA 160 cite this case
Central Indiana Ethanol, LLC, 2011 OEA 160.

TOPICS:

summary judgment
moot
ethanol
SEA 433
326 IAC 2-2
NAICS
chemical process plant
Putnam County Ethanol, LLC

PRESIDING JUDGE:

Catherine Gibbs

PARTY REPRESENTATIVES:

IDEM: Valerie Tachtiris, Esq.
Petitioner: Kim Ferraro, Esq.; Legal Environmental Aid Foundation
Benjamin H. Longstreth, Esq.; Andres Restrepo, Esq.;
Natural Resources Defense Council
Permittee: Anthony Sullivan, Esq.; Timothy Haley, Esq.; Barnes & Thornburg, LLP

ORDER ISSUED:

November 21, 2011

INDEX CATEGORY:

Air

FURTHER CASE ACTIVITY:

[none]

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STATE OF INDIANA)
)
COUNTY OF MARION)

BEFORE THE INDIANA OFFICE OF
ENVIRONMENTAL ADJUDICATION

IN THE MATTER OF:)
)
OBJECTION TO THE ISSUANCE OF FIRST MINOR)
REVISION PERMIT NO. 053-30294-00062 TO NEW)
SOURCE FESOP OPERATING PERMIT)
NO. F053-29180-00062)
CENTRAL INDIANA ETHANOL, LLC)
MARION, GRANT COUNTY, INDIANA)
_____)
Natural Resource Defense Council,)
 Petitioner,)
Central Indiana Ethanol, LLC,)
 Permittee/Respondent,)
Indiana Department of Environmental Management,)
 Respondent)

CAUSE NO. 11-A-J-4477

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

This matter came before the Office of Environmental Adjudication (the OEA or Court) on Central Indiana Ethanol LLC’s Motion for Summary Judgment; and the Court, being duly advised and having read the record, evidence motion, response, reply and supporting briefs now enters the following findings of fact, conclusions of law and final order:

Summary of Decision

The Natural Resource Defense Council (the NRDC) has appealed the issuance of an air permit to Central Indiana Ethanol LLC (CIE). The NRDC contends that the CIE facility is a chemical process plant and is, therefore, a “major source” (as defined by 326 IAC 2-7-1(22)(B)(xx)) or “major stationary source” (as defined by 326 IAC 2-2-1(gg)), subject to the prevention of significant deterioration (PSD) requirements. CIE has filed a Motion for Summary Judgment on the basis that this matter has been rendered moot by the passage of Senate Bill 433 which excludes ethanol plants from the definition of “chemical process plants”. The ELJ concludes that the passage of SB 433 renders this matter moot and summary judgment should be entered in favor of CIE.

FINDINGS OF FACT

1. On April 13, 2011, the Indiana Department of Environmental Management (the IDEM) issued Minor Permit Revision No. 053-30294-00062 to Federally Enforceable State Operating Permit No. F053-29180-00062 to Central Indiana Ethanol LLC (CIE).

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2. On May 2, 2011, the Natural Resources Defense Council (NRDC) filed a Petition for Administrative Review and Stay of Effectiveness.
3. CIE is an ethanol production facility that is currently engaged in the business of producing ethanol by natural fermentation.
4. CIE uses the same natural fermentation procedure described by the United States Environmental Protection Agency in the preamble to the federal ethanol rule found at 72 Fed. Reg. 24059, 24065 (May 1, 2007).
5. CIE is included in the North American Industry Classification System (NAICS) code number 325193.
6. On May 10, 2011, the Indiana General Assembly passed Senate Enrolled Act 433. An emergency was declared for this act making it effective immediately. This act provides that facilities that produce ethanol by natural fermentation and is included in NAICS code 325193 or 312140 shall not be considered “chemical process plants”.
7. The Air Pollution Control Board promulgated revisions to 326 IAC 2-2, effective August 20, 2011, which encompassed the changes made by SEA 433.
8. CIE filed its Motion for Summary Judgment on July 28, 2011. On August 18, 2011, the IDEM filed its Response to Central Indiana Ethanol, LLC’s Motion for Summary Judgment and the NRDC filed its Opposition to Central Indiana’s Motion for Summary Judgment. CIE filed its reply on September 13, 2011.

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 Env’tl. 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).

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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).

“When a dispositive issue in a case has been resolved in such a way as to render it unnecessary to decide the question involved, the case will be dismissed.” *Travelers Indem. Co. v. P.R. Mallory & Co.*, 772 N.E.2d 479, 484 (Ind. App. 2002). A case is deemed moot when there is no effective relief that can be rendered to the parties by the Court. *A.D. v. State*, 736 N.E.2d 1274, 1276 (Ind. App. 2000). However, this Court “may decide an arguably moot case on its merits if it involves questions of great public interest.” *Id.* “Cases that fit within this exception typically are those containing issues that are likely to recur.” *Id.*

The OEA has previously ruled, in *Putnam County Ethanol LLC*, 2011 OEA 1, that fuel grade ethanol plants, such as the one operated by CIE, were “chemical process plants”. However, at the time that decision was issued, Indiana had not amended its rules or statutes to mirror federal law which explicitly exempted fuel grade ethanol plants from the definition of “chemical process plants”. The ELJ based her decision on principles of statutory construction, concluding that Indiana law and regulations were clear that fuel grade ethanol plants were chemical process plants and that IDEM could not merely rely on changes made to federal law when those changes had not been made in Indiana law.

I.C. § 13-7-3-4(e) (as amended by Senate Enrolled Act 433) states:

- (e) For purposes of rules adopted by the board, a reference to "chemical process plants" does not include an ethanol production operation that:
 - (1) produces ethanol by natural fermentation after July 2, 2007; and
 - (2) is included in the North American Industry Classification System (NAICS) code:
 - (A) 325193 (Ethyl Alcohol Manufacturing); or
 - (B) 312140 (Distilleries); as described in 72 FR 24059 *et seq.* (May 1, 2007).
- This subsection expires April 1, 2012.

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326 IAC 2-2, 326 IAC 2-3 and 326 IAC 2-7 were amended to exclude ethanol production facilities that produce ethanol by natural fermentation from the definition of “chemical process plants.”

CONCLUSIONS OF LAW

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.

1. 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).
2. NRDC argues that until the changes are incorporated into the SIP, they are not effective. This might be persuasive if Indiana law differed from the federal law. This was the case in both *United States v. Cinergy Corp.*, Nos. 09-3344, 09-3350, 09-3351, slip op. (7th Cir. Oct. 12, 2010) and *Kentucky Resources Council, Inc. v. EPA*, 304 F. Supp. 2d 920 (W.D.Ky. 2004), in which regulators tried to enforce state laws that, not only had not been incorporated into the state’s respective SIP but were in direct conflict with federal law. That is not the case in this matter. Indiana has changed its law and regulations to mirror the federal law. While it is true that the changes have not been incorporated in the SIP and approved by U.S. EPA, it is only a matter of time before this happens. No logical argument can be made that this is not inevitable considering that the Indiana law now duplicates federal law.
3. *Putnam County Ethanol* can be distinguished from this case because the law that the OEA interpreted is no longer the law in Indiana. To say that this proceeding must remain open until such time as these formalities are completed would not a good use of judicial resources. This Court cannot ignore Indiana law. This Court cannot grant NRDC the relief it seeks as to do so would be contrary to Indiana law and regulations.
4. There is no genuine issue of material fact. Summary judgment in favor of CIE is appropriate.

FINAL ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Central Indiana Ethanol LLC’s Motion for Summary Judgment is **GRANTED**.

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.

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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 22nd day of November, 2011 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge