STATE OF INDIANA)
) SS:
COUNTY OF MARION)

IN THE MARION COUNTY SUPERIOR COURT
ENVIRONMENTAL DIVISION, ROOM NO. 12

POET BIOREFINING – NORTH MANCHESTER, LLC, PUTNAM COUNTY ETHANOL, LLC, CENTRAL INDIANA ETHANOL, INC., and the INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT,
Petitioners,

and

GREEN PLAINS BLUFFTON, LLC, ANDERSONS CLYMERS ETHANOL LLC,
Intervenors,

v.

NATURAL RESOURCES DEFENSE COUNCIL,
Respondent.

The Honorable David J. Certo
Commissioner Valerie Horvath

CAUSE NO. 49F12-1102-MI-005363
(Consolidated with CAUSE NO. 49F12-1102-MI-005373 & CAUSE NO. 49F12-1102-MI-005298)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER ON PETITION FOR JUDICIAL REVIEW OF ADMINISTRATIVE ORDER

This matter comes before the Court on the petition for judicial review of an administrative order issued by the Office of Environmental Adjudication ("OEA") on January 11, 2011 in a consolidated case involving two permits issued by IDEM to ethanol production plants (the "Order"). In the Order, OEA held that ethanol production plants constitute "chemical production plants" pursuant to 326 IAC 2-2-1(ff)(1)(U). This Court, having considered the motions, supporting and opposing legal memoranda, the designated evidence, and the oral arguments by each party's counsel, being duly advised, hereby finds that the Order is contrary to law, and must be reversed.

STATEMENT OF ISSUES

At issue in this case is whether the OEA properly interpreted the term "chemical process plants" under 326 IAC 2-2-1(ff)(1)(U); specifically whether the type of ethanol production plant operated by Petitioner(s) and Intervenor(s) is a "chemical process plant" under Indiana's Prevention of Significant Deterioration ("PSD") Program. The PSD program was created as part of the federal Clean Air Act. PSD applies only to "major stationary sources" and "major modifications of existing major stationary sources."

Additionally, a request has been made that this court stay the proceedings pending the outcome of *NRDC v. U.S. Envtl. Protection Agency*, No. 07-1257, Doc. 1322850 (D.C. Cir. 2011) where NRDC seeks review of the EPA Final Rule amending the definition of "chemical process plant".

FACTS AND PROCEDURAL HISTORY

On March 3, 2003, EPA approved an amendment to Indiana's SIP that incorporated for the first time Indiana's PSD program; this approval became effective on April 2, 2003. *See* Conditional Approval of Implementation Plan; Indiana, 68 Fed. Reg. 9892 (Mar. 3, 2003). In its approval, EPA adopted the March 23, 2001 version of 326 Ind. Admin. Code 2-2 *et seq.* Since March 3, 2003, IDEM has not submitted, nor has EPA approved, any formal requests for an amendment to the PSD rules in Indiana's State Implementation Plan (SIP), located at 326 Ind. Admin. Code 2-2 *et seq*.

On March 26, 2010, IDEM issued a Federally Enforceable State Operating Permit ("FESOP") No. F133-28725-00003 to Putnam County Ethanol, LLC ("Putnam County"). The Natural Resources Defense Council ("NRDC") filed a Petition for Administrative Review on April 13, 2010, alleging that the permit improperly failed to classify Putnam County as a

"chemical process plant." On June 30, 2010 this cause was consolidated with consent of the parties with a similar matter challenging a permit IDEM issued to POET Biorefining-North Manchester, LLC ("POET"). [1]

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the consolidated action pursuant to *inter alia*, Ind. Code § 4-21.5-5-3.

2. Upon judicial review of an administrative decision, the trial court sits as a court of appellate review. *Ind. Dep't of Natural Res. V. United Refuse Co., Inc.*, 615 N.E.2d 100, 103 (Ind.1993). ("[a] trial court acts as an appellate court when it reviews an administrative order"). During judicial review of an administrative action, the trial court must evaluate determinations of law without deference to the ALJ's conclusion. *Id.* "A court owes no deference to an agency's conclusion of law." *Prosser v. J.M. Corp.*, 629 N.E.2d 904, 907 (Ind. Ct. App. 1994) *quoting County Dept. of Pub. Welfare v. Deaconess Hosp.*, 588 N.E. 2d 1322, 1327 (Ind. Ct. App. 1992).

3. Judicial review of disputed issues of fact must be confined to the agency record for the agency action supplemented by additional evidence as provided by statute. Ind. Code § 4-21.5-5-11. The Court analyzes the record as a whole to determine whether the administrative findings are supported by substantial evidence. Ind. Code § 4-21.5-5-11.

4. This Court must grant judicial relief where the Petitioner has been "prejudiced by an agency action that is ... not in accordance with the law." Ind. Code § 4-21.5-5-14(d)(1).

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[1] IDEM issued a FESOP to POET on May 5, 2010. After briefing in the underlying administrative appeal, but before OEA issued a ruling, the NRDC filed a petition for review regarding a permit IDEM issued to Central Indiana Ethanol ("CIE"). Like POET and Putnam County, NRDC objected to the permit because IDEM did not classify CIE as a "chemical process plant." CIE moved to intervene in the POET case, since the issues raised by NRDC in the CIE appeal were identical to those under consideration in the POET case. CIE's Petition to Intervene was denied on the same day that OEA issued the Order.

5. Questions of regulatory interpretation like the one before the Court are analyzed by applying the well-established rules of statutory construction. *Bourbon Mini-Mart, Inc., v. Comm'r, Ind. Dep't of Envtl. Mgmt.*, 806 N.E.2d 14, 20 (Ind. Ct. App. 2004). 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. *Id.* 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.*

6. The Clean Air Act (CAA, or "the Act") establishes a regulatory framework "to protect and enhance the quality of the Nation's air resources" in an effort to "promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1). The CAA creates a comprehensive schedule for controlling the nation's air quality through both federal and state regulation. Congress and [the U.S. Environmental Protection Agency ("EPA")] set national minimum air-quality standards, but primary responsibility for assuring air quality rests with the states.

7. Under the cooperative federalism structure of the CAA individual states must create State Implementation Plans (SIPs) that allow for the enforcement and achievement of national ambient air quality standards (NAAQS) set by EPA. 42 U.S.C. § 7410(a)(1). Each implementation plan submitted by a State shall be adopted by the State after "reasonable notice and public hearing." *Id.*

8. State Implementation Plans "do not take effect until approved by EPA." *Envtl. Def. v. EPA*, 467 F.3d 1329, 1331 (D.C. Cir. 2006) (citing 42 U.S.C. § 7506(c)(1)). Modifications and revisions of a SIP must "be approved by EPA to become effective." *Sierra Club v. Ind.–Ky. Elec.*

Corp., 716 F.2d 1145, 1152 (7th Cir. 1983); *see also* 326 Ind. Admin. Code 2-2-1(nn) (2010) (changes to the PSD program must "be[] approved by the U.S. EPA and incorporated into the SIP"). An existing SIP remains in force until EPA approves a formal amendment. *Gen. Motors Corp. v. United States*, 496 U.S. 530, 540 (1990).

9. In "clean air" or attainment areas under the CAA, no "major emitting facility" may begin construction or undertake certain modifications without first demonstrating that emissions from construction or operation of the facility will not exceed applicable limitations under the "prevention of significant deterioration" program (PSD). 42 U.S.C. § 7475(a)(3)

10. The PSD program applies to new major stationary sources and major modifications which emit, or have the potential to emit, one hundred tons per year or more of any air pollutant from stationary sources including chemical process plants. 42 U.S.C. § 7479(1). *See* 326 Ind. Admin. Code § 2-2-2.

11. The term "chemical process plant" became part of Indiana's PSD rules on October 1, 1980, when the Air Pollution Control Board finalized a rule that adopted the term.[2] The Air Pollution Control Board adopted this rule as required by a nearly identical EPA rule using the term "chemical process plants," which had been adopted in 1978.

12. The term "chemical process plant" has been subject to multiple interpretations by the federal[3] and state administrative agencies[4] that implement the PSD program.

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[2] The term was re-codified throughout the years. There is no indication in the record that the Air Pollution Control Board intended to retain or change its original understanding of the term "chemical process plant".

[3] The EPA has struggled to consistently define "chemical process plant". In 1981, EPA stated: "The case of the category 'chemical process plant' is particularly difficult since *virtually any manufacturing process which combines raw materials could, in some way, be construed as a 'chemical process plant'*." *See* EPA Memorandum to Thomas W. Devine, August 21, 1981 at p. 1.

In 2007, EPA stated: "We do not believe the term 'chemical process plant' is subject to a 'plain meaning interpretation.' There is not a universally accepted definition of chemical process, and accepted definitions differ depending on whether you view the term from a purely scientific sense or an engineering sense, or for economic purposes." 72 Fed. Reg. at 24063.

13. As originally adopted, the term "chemical process plant" did not contemplate including ethanol production plants. *See* New England Research Corporation Report (the "Research Corp. Report); 71 Fed. Reg. 12239, 12242 (March 9, 2006).

14. Prior to 2007, both EPA and IDEM consistently licensed fuel ethanol plants as "chemical process plants" subject to a 100 TPY major source threshold for PM emissions, including fugitive emissions[5].

15. On May 1, 2007, the EPA issued a Final Rule changing the major stationary source definition in the PSD to exclude ethanol plants like those at issue from the definition of "chemical process plants" contained in the source specific listing. 72 Fed. Reg. 24,060-24,061.

16. Indiana's SIP incorporates the Air Pollution Control Board rules and rulings by reference. *See, e.g.,* 326 Ind. Admin. Code § 1, *et seq.*; 326 Ind. Admin. Code § 2, *et. seq.*; Federal SIP Citation Number 325; 326 Ind. Admin Code §1.1-1-01; 326 Ind. Admin. Code § 2-7-1; *see also* 46 Fed. Reg. 54,943 and 60 Fed. Reg. 57,188.

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[4] IDEM previously issued permits finding that ethanol plants were "chemical process plants." The Indiana General Assembly passed a law clarifying that the term "chemical process plants" does not include ethanol production plants that produce ethanol by natural fermentation. Ind. Code § 13-14-3-4(e). The Indiana Air Pollution Control Board issued a rule that confirmed that "[c]hemical process plants, exclud[e] ethanol production plants that produce ethanol by natural fermentation ..." *See* 326 IAC 2-2-1(ff)(1)(U); 20110817-IR-326110099FRA.

[5] The record contains several examples of IDEM permits that classified fuel ethanol plants as chemical process plants. *See, e.g.,* Initial POET-North Manchester Permit; Initial POET-Cloverdale Permit; Iroquois Bio-Energy Co. Permit (Ex. 49 to NRDC's Summary Judgment brief before the OEA); Hartford Energy LLC Permit (Ex. 50 to NRDC's Summary Judgment brief before the OEA). The record also shows that for at least twenty-six years EPA consistently classified fuel ethanol plants as "chemical process plants." *See, e.g.,* Memo from E. Reich, Director, Division of Stationary Source Enforcement, EPA Office of Air, Noise, and Radiation, to T. Devine, Director, Air and Hazardous Materials Division, EPA Region 4 (Aug. 21, 1981) ("Reich Memo") at 2 (describing EPA's policy for interpreting fuel ethanol plants as chemical process plants); Proposed Ethanol Rule, 71 Fed. Reg. at 12,243 (describing EPA's historical treatment of fuel ethanol plants as chemical process plants). The parties do not dispute that IDEM and EPA classified fuel ethanol plants as chemical process plants prior to 2007.

17. In 2011, the Indiana Legislature passed a law that excludes fuel ethanol plants from the definition of "chemical process plants." Senate Bill 433 (2011), codified at Ind. Code § 13-17-3-4(e).

18. On June 3, 2011, IDEM issued an agency nonrule policy document which excludes ethanol plants from "chemical process plant" classification.

19. Following the formal statutory change, Indiana amended its Administrative Code redefining "chemical process plants" making them subject to a major source threshold of 100 TPY, including fugitive emissions under the PSD program, and explicitly excluding ethanol plants. 326 Ind. Admin. Code 2-2-1(ff)(1)(U).

20. Because Indiana has neither requested nor received approval from EPA for a formal SIP amendment altering its PSD rules, the SIP approved in 2003 remains governing law. *See, e.g.*, *Sierra Club*, 716 F.2d at 1152. ("[M]odifications or revisions [to a SIP] must be approved by the EPA to become effective."); *Duquesne Light Co. v. EPA*, 698 F.2d 456, 471 (D.C.Cir.1983) ("[C]urrent SIPs remain in force until EPA grants formal approval to a revision.").

21. The term "chemical process plant" is ambiguous. It has no plain meaning and has been subject to multiple interpretations. Federal and state agencies have at times both included and excluded ethanol production plants from the definition of "chemical process plant".

22. Questions of regulatory interpretation are analyzed by applying the well-established rules of statutory construction. *Bourbon,* 806 N.E.2d at 14. If a statute is clear and unambiguous, it is not reasonably susceptible to judicial interpretation. *Id.* When the language of a statue is reasonably susceptible to more than one construction, we must construe the statue to determine the apparent legislative intent. *Id.*

23. On July 2, 2007, NRDC filed a petition with the U.S. Court of Appeals for the District of Columbia Circuit seeking review of the EPA Final Rule which amended the definition of "chemical process plant". *NRDC v. U.S. Envtl. Protection Agency*, No. 07-1257, Doc. 1322850 (D.C. Cir. 2011), ("the D.C. Circuit Challenge"). The D.C. Circuit challenge is currently being held in abeyance.

24. Indiana Courts have discretion in determining whether an action should be stayed. *Young v. Herald*, 209 N.E.2d 525, 527 (Ind. App. 1965).

SUMMARY

Federal law excludes ethanol plants like those at issue from the definition of "chemical process plants" contained in the source specific listing. The legislative intent regarding the definition of "chemical process plant" was made clear when the EPA issued its Final Rule on May 1, 2007.

The Indiana legislature made its intent clear when it amended Indiana statute to specifically exclude ethanol production plants from the definition of "chemical process plant" in Ind. Code § 13-14-3-4(3). Similarly, Indiana Administrative Code has been amended to exclude ethanol production plants from the definition of "chemical process plants".

Based on the three aforementioned clarifications to the definition of "chemical process plant", this Court believes the legislative intent is apparent: the type of ethanol production plant at issue is not a "chemical process plant" as defined by current federal and state law.

Nothing in EPA regulations, Indiana's EPA-approved SIP, or Indiana's current SIP which awaits EPA approval, includes a definition of "chemical process plant" which contradicts the clarification made by subsequent changes to EPA rule and state law.

The instant case is based on Indiana law passed well before EPA's 2007 rule. The matter before the court is fully briefed and argued, whereas the D.C. Circuit Challenge is currently held in abeyance. A decision by the D.C. Circuit will not necessarily dispose of this case, as it concerns a distinct legal question. Therefore, this Court declines the invitation to stay the proceedings pending an outcome in the D.C. Circuit.

ORDER

For the foregoing reasons, this Court FINDS, ORDERS and DECREES that ethanol production plants that produce ethanol by natural fermentation do not constitute "chemical process plants" under 326 IAC 2-2-1(ff)(1)(U). The Court denies the request to stay these proceedings pending an outcome in *NRDC v. U.S. Envtl. Protection Agency*, No. 07-1257, Doc. 1322850 (D.C. Cir. 2011). The Order issued by the Office of Environmental Adjudication in the matter of POET and Putnam County Biorefining's permit is hereby REVERSED.

IT IS SO ORDERED **in Indianapolis, Indiana, this** 1st **day of** May, **2012.**

Commissioner, Marion County Superior Court, Environmental Division

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