TOPICS:
Clifty Creek
waiver
SO_2 monitoring requirements
substitute administrative law judge
IC 4-21.5-3-27
issue the order upon the record generated by a previous administrative law judge
motion for summary judgment
genuine issue of material fact
cross motions
ambient monitoring
326 IAC 7-3
ambient sulfur dioxide data
alternative monitoring source
10,000 tons
10 kilometers
deference to agency's interpretation of statute
policy
rule interpretation
consistency

PRESIDING JUDGE:
Biesecker

PARTY REPRESENTATIVES:
Permitte/Petitioner: Anthony C. Sullivan, Esq., Bryan G. Tabler, Esq.
IDEM: Aaron Schmoll, Esq.

ORDER ISSUED:
May 8, 2003

INDEX CATEGORY:
Air

FURTHER CASE ACTIVITY:
[appealed]

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

IN THE MATTER OF:	)	
	)	
OBJECTION TO THE DENIAL OF REQUEST	)	CAUSE NO. 01 -A-J-2740
FOR DISCONTINUATION OF NORTH MADISON	)	
SO_2 MONITORING SITE AND THE LIBERTY	)	
RIDGE METEOROLOGICAL SITE	)	
INDIANA-KENTUCKY ELECTRIC CORP.	)	

FINAL ORDER GRANTING SUMMARY JUDGMENT

PROCEDURAL BACKGROUND

On March 7, 2001, Indiana Kentucky Electric Corp. (IKEC) requested from the Indiana Department of Environmental Management (IDEM) a waiver of its SO2 monitoring requirements at its Clifty Creek facility. IDEM denied the request by letter dated May 15, 2001[1].

On May 31, 2001, through counsel, IKEC filed a Petition for Administrative Review of IDEM's denial, alleging that the denial was arbitrary and capricious and inconsistent with past agency practice and applicable law.

Both parties moved for summary judgment and in a decision dated August 2, 2002, Chief Environmental Law Judge Wayne Penrod (ELJ Penrod) granted IDEM's motion for summary judgment and denied IKEC's motion.

On August 2, 2002, IKEC filed its motion to reconsider and vacate the order granting summary judgment in favor of IDEM. In an order dated August 15, 2002, ELJ Penrod granted IKEC's motion and vacated August 2nd order and set a September 6, 2002 deadline for filing supplemental briefs. The parties filed their briefs in a timely manner.

Effective on or about April 1, 2003, ELJ Penrod retired from his position as Director and Chief Environmental Law Judge without issuing a reconsidered ruling on the pending summary judgment motions. The undersigned was appointed Interim Acting Environmental Law Judge and assumed responsibility for former ELJ Penrod's assigned matters until the appointment of a permanent successor.

[1] One of the grounds IDEM alleged as a basis for its denial was IKEC's failure to include air quality dispersion modeling data with its waiver request, although IKEC argues that this information had been provided to IDEM in the past and was readily available to them. This ruling does not require that we reach a decision on that point and it is therefore not addressed.

This decision is issued under the authority of IC 4-21.5-3-27(e): "A substitute administrative law judge may issue the order under this section upon the record that was generated by a previous administrative law judge."

JURISDICTION AND STANDARD OF REVIEW

The Indiana Office of Environmental Adjudication (OEA) has jurisdiction over this matter pursuant to IC 4-21.5-7-3 and has the authority to issue an order of summary judgment pursuant to IC 4-21.5-3-23.

Summary judgment is proper "to terminate litigation about which there is no factual dispute and which may be determined as a matter of law." United Farm Bureau Mutual Insurance Co. v. Schult, 602 N.E. 2d 173, 174 (Ind. App. Dist 1 1992). A grant of summary judgment requires that the evidence show no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); Ind. Dept. of Environmental Management v. Medical Disposal Services, Inc. 729 N.E.2d 577, 579 (Ind. 2000). Cross motions for summary judgment do not alter this standard. State Farm Fire & Casualty Company v. Garrett. 783 N.E.2d 329, 332 (Ind. App. 2003).

From the affidavits and exhibits offered in this proceeding, there are no undisputed material facts and summary judgment is appropriate. The OEA makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. If appropriate, any finding of fact made herein shall also be considered a conclusion of law and any conclusion of law shall be considered a finding of fact.

2. The Clifty Creek power plant emits in excess of 10,000 tons of S02 per year. In the year 2000, the facility's annual emissions were 42,673 tons and in 2001, the emissions were 39,164 tons. Exhibits 2 and 5 to the IKEC Motion for Summary Judgment, filed May 31, 2002 (the IKEC Motion); Affidavit of Donald Fulkerson, paragraph 13, attached as Exhibit 1 to IKEC's Response to the IDEM Motion, filed July 1, 2002. (IKEC Response).

3. IDEM has previously granted waivers allowing the removal of all S02 monitors associated with the Clifty Creek plant, expect for the subject monitor, North Madison.[2] IKEC Admissions 3,4 and 6, attached to IDEM's Motion for Summary Judgment, filed May 31, 2002. (IDEM Motion); IKEC Exhibit 1 to the IKEC Motion.

[2] There is some discrepancy on the number of monitors at Clifty Creek that have been removed. IKEC's original waiver letter (Exhibit 1 to the IK.EC Motion) specifies that total of four S02 monitors. Mr. Fulkerson's Second Affidavit and IKEC Admission 6 state that IKEC formerly operated six S02 monitors.

4. The only S02 monitoring station and the only meteorological monitor that IKEC operates at Clifty Creek are the subject monitors. IKEC Admissions 3 and 4, attached to the IDEM Motion.

5. The closest S02 monitor to the Clifty Creek plant is located approximately 64 kilometers (40 miles) away at the Tanner's Creek facility operated by American Electric Power Service Corporation. IKEC Admissions 3,4,7,8 and Affidavit of Dick Zeiler, paragraph 13, attached to the IDEM Motion.

6. IDEM requires ambient monitoring for purposes of 326 IAC 7-3 to be located no more than ten (10) kilometers from the source of the S02 emissions. Affidavit of Dick Zeiler, paragraph 11, attached to the IDEM Motion.

7. There is no way to obtain actual ambient sulfur dioxide data other than operating ambient sulfur dioxide monitors. Affidavit of Donald Fulkerson, paragraph 17, attached as Exhibit 1 to the IKEC Response.

8. S02 emissions from IKEC have steadily fallen during the past decade. IKEC's emissions are currently at approximately 15% of the S02 emission levels approved in 1988. Affidavit of Donald Fulkerson, paragraphs 13-15, attached as Exhibit 1 to the IKEC Response.

9. In the past IDEM has granted several waivers allowing facilities to close S02 monitoring stations. With one exception (discussed in the next paragraph), the waivers have been granted when either an alternative monitoring source was in the vicinity or when the facility emitted less than 10,000 tons of S02 annually. In the latter circumstance, the small facility would, presumably, not even be subject to the terms of S02 monitoring under 326 IAC 7-3. Exhibits 9,10 and 11 to the IKEC Motion.

10. In the case of the Pritchard station waiver, there is no evidence that an alternative monitoring site was located within 10 kilometers of the emission source. However, at the time the waiver request was made, Pritchard emitted less than 10,000 tons of S02 annually. Their waiver request projected that the 1997 emissions would be 10,997 tons, just slightly over the threshold for the ambient monitoring requirement. As of 2000, the Pritchard station emits 17,663 tons of S02, an emission level that is less than half that of the Clifty Creek facility. Exhibits 5 and 14 to the IKEC motion.

CONCLUSIONS OF LAW

1. The Clifty Creek facility is subject to the monitoring requirements of 326 IAC 7-3-1 and 2 because it emits more than 10,000 tons of sulfur dioxide annually.

2. IDEM may grant waivers of the monitoring requirement pursuant to 326 IAC 7-3-2(d) which reads as follows:

> A source owner or operator may petition the commissioner for an administrative waiver of all or some of the requirements of this section if such owner or operator can demonstrate that ambient monitoring is unnecessary to determine continued maintenance of the sulfur dioxide ambient air quality standards in the vicinity of the source. The demonstration shall address uncertainties in any air quality dispersion models used in the demonstration and shall address the adequacy of any existing monitoring data to characterize the worst-case ambient concentrations in the vicinity of the source. A waiver shall be effective upon written approval by the commissioner. The commissioner may establish conditions in the approval of a waiver to assure compliance with the provisions of this article. Failure to continuously meet the requirements for obtaining a waiver or failure to comply with any condition contained in the approval of a waiver shall render void any waiver issued.

3. Courts and, by extension, administrative adjudicatory agencies, must give considerable deference to an agency's interpretation of the statute it is charged with enforcing. Peabody Coal Company v. IDNR, 606 N.E.2d 1306 (Ind. App. 1992); Jones v. Review Bd. Of Indiana Employment Sec. Div. 508 N.E.2d 1322 (Ind. App. 1987). (An agency's interpretations of the statute are to be afforded great weight and are not to be disturbed so long as they have a rational basis.)

4. IKEC argues that IDEM has imposed an irrational interpretation on the waiver rule and therefore should be accorded no such deference. IKEC argues that the statute clearly anticipates the possibility that all ambient monitoring stations could be eliminated in a vicinity so that no entity has any ambient monitoring responsibility. Yet IDEM's interpretation fails to allow for the possibility that "all" of a source's ambient S02 monitors could be eliminated. Because, IKEC argues, IDEM refuses to allow any substitute for actual ambient air monitors as a way to determine continued maintenance, IKEC could never obtain a waiver of **all of** its monitors in the Clifty Creek vicinity because it could never demonstrate that ambient monitoring is unnecessary.

5. The rule is simply not as unambiguous in its language as IKEC believes and the sentence in question is susceptible of multiple interpretations. Both parties have, by implication, inserted additional language into the operative sentence, in order to clarify the meaning that each endorses:

> IKEC: A source owner or operator may petition the commissioner for an administrative waiver of all or some of the requirements of this section if such owner or operator can demonstrate that ambient monitoring **[from any source or facility]** is unnecessary to determine continued maintenance of the sulfur dioxide ambient air quality standards in the vicinity of the source.
>
> IDEM: A source owner or operator may petition the commissioner for an administrative waiver of all or some of the requirements of this section if such owner or operator can demonstrate that ambient monitoring **[by the source owner or operator seeking the waiver]** is unnecessary to determine continued maintenance of the sulfur dioxide ambient air quality standards in the vicinity of the source.

The IKEC interpretation anticipates that some alternative measuring structure or data source will substitute for ambient monitoring. The IDEM interpretation assumes that ambient monitoring is needed for continuous maintenance but that any individual source may be excused from the duty, provided that some entity performs the function.

6. Although it is unlikely that IKEC will exceed the S02 limits imposed upon it, and indeed, has listed several safeguards to assure that their own emissions are within the required limits, ambient air monitoring has a broader goal than policing IKEC emissions. It monitors the air quality in the entire vicinity, including sources that are independent of and beyond the control of IKEC. Even if we assume that IKEC's past practice is a perfect indicator of its own future emissions conduct, IKEC cannot predict the future of other S02 sources. Both parties agree that the only way to monitor actual ambient air quality is through actual monitoring. The rule imposes a duty that monitoring for continuance maintenance be performed.

7. IDEM's policy for requiring that S02 monitoring sites be located within 10 kilometers of the emission source is consistent with the EPA rules for ambient S02 monitoring found in 40 CFR Part 58, Appendix D.

8. The IDEM interpretation of the rule, which requires that IKEC continue to operate its Clifty Creek monitoring station, in that it is the sole entity that performs this function in the vicinity, is a reasonable one.

9. IDEM has not been arbitrary and capricious in its application of this policy or this interpretation of its rule. IDEM has a policy of maintaining at least one monitoring station in each area and the agency has consistently followed the policy. The Pritchard exception, if it is an exception at all, represents a minor deviation from the policy. An administrative agency should, of course, issue its decisions with consistency so as to offer some predictability, fairness and method to its decision making process. But perfection is not the standard to be applied, nor is unyielding adherence to a position advisable. In light of the fact that the Pritchard station was barely with the emission requirements at the time of the waiver, this waiver does not undermine the agency's demonstrated commitment to the policy.

10. IDEM has demonstrated consistency in its decisions on ambient S02 monitoring waivers with the goal of preserving a minimal network and preventing the type of voids in the network that would result from the absence of any monitoring site in the Clifty Creek vicinity.

ORDER

IDEM's motion for summary judgment is hereby GRANTED and IKEC's motion for summary judgment is hereby DENIED.

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

IT IS SO ORDERED in Indianapolis, Indiana this 8th day of May, 2003.

Annette Biesecker,
Acting Chief Administrative Law Judge