

**Objection to the Issuance of Permit No. CP-129-8541-00039,
Conagra Soybean Processing Company, Posey County, Indiana
2000 OEA 15 (98-A-J-2092)**

TOPICS:

Environmental Appeals Board, EAB
prevention of significant deterioration, PSD
clear error
jurisdiction
collateral estoppel
ozone
NAAQS
Monitoring
PM[10]
40 C.F.R. § 60.8
waiver
delegation
dismissal
summary judgment
consumption analysis

PRESIDING JUDGE:

Penrod

PARTY REPRESENTATIVES:

Petitioner: John Blair
Respondent/Permittee: S. Andrew Bowman, Esq., Jennifer Thompson, Esq.
McHale Cook and Welch, PC
IDEM: Betsy Zlatos, Esq.

ORDER ISSUED:

March 16, 2000

INDEX CATEGORY:

Air

FURTHER CASE ACTIVITY:

[none]

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5. On September 8, 1999, the EAB issued an Order Denying Review (the EAB decision) as to all the issues raised by VWI and CGB in the EAB Petitions that were assigned PSD Appeal Numbers 98-27 and 98-28. The Order was signed by Kathie A. Stein, Environmental Appeals Judge.
6. All of the issues raised by CGB and most of the issues raised by VWI in the EAB petitions were identical to the issues raised in this appeal in that CGB and VWI alleged that there were deficiencies in IDEM's air quality analysis; that IDEM failed to demonstrate that the proposed ConAgra facility will not cause or contribute to an exceedance of the National Ambient Air Quality Standard (NAAQS) for ozone; that the ConAgra permit fails to satisfy the requirements for preconstruction monitoring for PM[10]; that IDEM performed an inadequate increment consumption analysis for PM[10]; and alleged the inadequacy of IDEM's economic growth, soils, vegetation and visibility analyses. CGB and VWI also alleged alternately the inadequacy of the offset provisions in Condition 38 of the ConAgra permit or the legal support thereof.
7. The EAB decision stated that "Petitioners have failed to carry their burden and we cannot find that IDEM clearly erred in concluding that ConAgra's facility would not cause or contribute to an exceedance of the NAAQS for ozone."
8. The EAB decision stated that "IDEM adequately considered the factors of the Monitoring Guidelines, and made a reasoned judgment that PM[10] pre-construction monitoring is not necessary in this case. Petitioners make no persuasive argument and point out no data to refute IDEM's judgment." Concerning pre-construction monitoring, the EAB further stated that "IDEM's decision is not clearly erroneous".
9. The EAB denied review of the PSD increment consumption analysis because CGB did not demonstrate clear error on the part of IDEM.
10. The EAB decision denied review of CGB and VWI additional impact analysis issues because CGB and VWI failed to demonstrate clear error on IDEM's part.
11. The EAB decision denied review of the offset provisions of Condition 38 of the ConAgra PSD permit and stated:

In this case, we do not find clear error with IDEM's conclusion that the ozone NAAQS will not be violated, as discussed supra. Upon our examination of the record, we conclude that the offsets contemplated by Condition 38 were not considered in demonstrating that the significant impact level was not exceeded.
12. Additionally, Rhetorical Paragraph 7 of VWI's Petition for Review in this cause challenges IDEM's Best Available Control Technology (BACT) determination pursuant to the PSD rules found at 40 CFR § 52.21 (j).

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13. VWI's Petition For Review in this cause, Rhetorical Paragraph 10 refers to a waiver of a New Source Performance Standard (NSPS) (performance test) for which IDEM allegedly failed to provide an opportunity for public review and comment. The waiver is contained in a letter from the U.S. EPA to ConAgra's environmental consulting firm and was issued pursuant to 40 C.F.R. § 60.8 (b).

CONCLUSIONS OF LAW

1. The ConAgra PSD permit was issued by IDEM to ConAgra under the federal PSD program. *See* Clean Air Act § 165, 42 U.S.C. § 7475 (CAA); 40 C.F.R. § 52.21.
2. The responsibility for conducting source review for U.S. EPA under the PSD program has been delegated to IDEM pursuant to 40 C.F.R. 52.21 (u). IDEM implements the federal PSD program through its rules as set forth in 326 IAC 2-2 *et seq.*
3. Indiana does not have an approved State Implementation Plan (SIP) for the PSD program.
4. The federal law at 40 C.F.R. § 124.19 vests sole authority with the EAB to review PSD decisions. *See In re West Suburban Recycling and Energy Center, L.P.*, 6 E.A.D. 692, 1996 WL 780306 (EAB 1996).
5. The U.S. EPA — Indiana Delegation Agreement specifically states that

The permit appeal provisions in 40 C.F.R. § 124.19 (a) shall apply to all appeals to the Administrator on permits issued by the IDEM under this delegation. The provisions of 40 C.F.R. § 124.19 (b) apply to permits which the Administrator decides to review. **The administration of the appeal procedures is not delegated to the State.** [Emphasis added]
6. The Indiana Office of Environmental Adjudication has no jurisdiction to review the PSD components of the ConAgra permit.
7. The PSD components of the ConAgra permit of which VWI seeks review are as follows: The VWI Petition For Review Rhetorical Paragraphs 2,3,4,5,6,7,8,9 and 11.
8. Assuming *arguendo* that the Indiana Office of Environmental Adjudication has jurisdiction to review the PSD components of the ConAgra permit, the EAB and the OEA use substantially the same standard of review such that a final decision by the EAB will be given collateral estoppel effect in a proceeding before the OEA. *See In re Objection to the Issuance of Permit Approval No. 4245 Top Sow, LLC. Flora, Indiana, Cause No. 97-W-J-1693*, 1997 WL 754524 at *3 (Ind. Off. Env. Adjud. May 9, 1997); *In re Denial of Voluntary Remediation Application # 6940801 Dana Corporation Wayne County, Indiana*, Cause No. 94-S-J-1142, 1997 WL 297777 at *3 (Ind. Off. Env. Adjud. May 9, 1997).

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9. The EAB's Order of September 9, 1999 is a final agency decision pursuant to 40 CFR § 124.19(f), and OEA must recognize the EAB's Order for the purpose of applying collateral estoppel in the present proceeding.
10. VWI is collaterally estopped from relitigating the PSD components of the ConAgra permit in the state administrative forum.
11. The VWI Petition for Review filed with the OEA raises objections to Condition 38 only as it relates to the PSD requirements and do not raise any issues that are independently grounded in Indiana law.
12. The federal waiver as authorized in 40 C.F.R. § 60.8 does not impose upon the State PSD permitting authority, in this case Indiana, any obligation to provide public review and comment on the waiver. For this reason, the issue presented by VWI's Petition For Review, Rhetorical Paragraph 10 fails to state a claim upon which OEA can grant relief.
13. The pleadings, briefs, exhibits and other supporting documentation demonstrate that there is no genuine issue of material fact and that the law is with IDEM and ConAgra.
14. The Petitioner, VWI, has not alleged any facts which justify why its Petition for Review should not be dismissed with prejudice based on the Petition's failure to state a claim upon which OEA can grant relief and/or the collateral estoppel effect of the final decision of the EAB.
15. Summary judgment should be granted as a matter of law.

FINAL ORDER GRANTING SUMMARY JUDGMENT

Based on the foregoing Findings of Fact and Conclusions of Law, the Presiding Administrative Law Judge hereby **GRANTS** IDEM's and ConAgra's Motions to Dismiss. It is further **ORDERED** that the VWI Petition for Review is dismissed, with prejudice.

You are further notified that pursuant to Ind. Code § 4-21.5-5, this Final Order is subject to judicial review. Pursuant to Ind. Code § 4-21.5-5, 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 16th day of March, 2000.

Wayne E. Penrod
Chief Administrative Law Judge