

Objection to Denial of NOx Early Reduction Credit Request, Merom Generating Station
Hoosier Energy Rural Electric Cooperative, Inc., Merom, Sullivan County, Indiana
2003 OEA 1 (02-A-J-2959)

TOPICS:

summary judgment
motion to dismiss
NOx
nitrogen oxide
326 IAC 10
early reduction credit
ERCs
compliance supplement pool
emission reduction
ozone season
deadline
late file
October 31
arbitrary and capricious
pro rata basis
memorandum
statute, construction
standard of review
genuine issue of material fact

PRESIDING JUDGE:

Vogel

PARTY REPRESENTATIVES:

Petitioner: Guinn P. Doyle, Esq.
IDEM: Aaron Schmoll, Esq.

ORDER ISSUED:

February 4, 2003

INDEX CATEGORY:

Air

FURTHER CASE ACTIVITY:

[none]

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3. To this end, The Indiana Air Pollution Control Board promulgated 326 IAC 10 to reduce NOx emissions in Indiana.
4. Incentives for early reduction of NOx emissions have been offered through a “compliance supplement pool” which establishes credits for early NOx reductions (ERCs) on behalf of sources that have demonstrated emissions reductions during the 2001, 2002, and 2003 ozone seasons.
5. For the years 2001 and 2002, ERCs were available to sources that complied with the requirements of the rule; those requirements included requesting early reduction credits by a deadline of December 31, 2001.
6. Hoosier Energy owns and operates its Merom Generating Station # 2, an electric power plant, in Merom, Indiana.
7. On August 15, 2002, pursuant to 326 IAC 10-4-15 (b)(1)(F), Hoosier Energy submitted an application to IDEM requesting 112 ERCs for NOx emissions reductions in 2001.
8. Hoosier Energy was aware that the “deadline for submittal of this request has passed” at the time the company requested consideration of ERCs for the year 2001. (Hoosier Energy’s designated materials exhibit No. 1)
9. By letter dated September 19, 2002, IDEM denied Hoosier Energy’s request for early reduction credits stating that the deadline for requesting consideration of an application for ERCs for the year 2001 had passed. (Hoosier Energy’s designated materials exhibit No. 2)
10. Indiana issues ERCs from a “compliance supplement pool” established by IDEM pursuant to 326 IAC 10-4-15 et seq.; the total number of ERCs available in 2001 was 9,958.
11. IDEM allocated 3,142 ERC’s in 2001 to several sources that requested consideration of their applications prior to December 31, 2001.
12. The remainder (9,958 —3,142 = 6,816) are available for 2002 requests; as of November 6, 2002 a total of 23, 294 ERC requests were made for the year 2002 and will be allocated on a pro rata basis as established in 326 IAC 10-4-15 (b)(1)(G).

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Discussion

The early reduction credit program established by IDEM pursuant to federal mandate established an “October 31 of the year of emissions reductions” deadline for requesting ERCs¹. The rule, modeled after 40 CFR 96.55 (c), grants authority to the Department (IDEM) to approve a later date than October 31 to accept requests for ERCs. On November 28, 2001, IDEM sent sources subject to the rule a Memorandum notifying sources that a later date had been approved for 2001: December 31. IDEM’s notice included several reasons for the establishment of a December 31 deadline for 2001; 1) several sources requested the extension from October 31; 2) the effective date of the rule was only about a month and a half before the deadline; 3) many sources had been involved with addressing other aspects of the rule including preparation of permit applications and the establishment of NOx allowance accounts; 4) the very short time between the effective date of the rule and the Oct. 31 submittal deadline for sources to evaluate activities in the past summer to determine if reductions had occurred. IDEM chose December 31 to “ensure that we have adequate time to evaluate all requests” (November 28, 2001 Memorandum).

Hoosier Energy argues that the December 31 deadline established by IDEM and IDEM’s subsequent September 15, 2001 denial of their requested 112 ERCs was arbitrary and capricious. Hoosier Energy makes several arguments to support its position. Hoosier Energy alleges that all comparable requests made by similarly situated sources were granted ERC’s and that IDEM’s treatment of Hoosier Energy was disparate, inconsistent and without good reason, leading to a decision that was arbitrary and capricious. This Environmental Law Judge has found that all parties granted ERCs in 2001 had submitted their request by the December 31 deadline and thus, were not similarly situated to Hoosier Energy.

Hoosier Energy alleges that no one would be prejudiced by IDEM’s grant of Hoosier Energy’s request. However, this ELJ finds that in 2001 IDEM allocated 3,142 ERCs from a compliance supplement pool of 9,958 ERCs to several sources that requested consideration of their applications prior to December 31, 2001. The remainder (9,958 — 3,142 = 6,816) are available for 2002 requests; as of November 6, 2002 a total of 23,294 ERC requests had been made for the year 2002 and the ERCs will be allocated on a pro rata basis as established in 326 IAC 10-4-15 (b) (1) (G). Therefore, the sources that requested 23,294 ERCs in a timely manner in 2002 must share 6,816 remaining credits for 2002. IDEM would place those sources at a disadvantage by awarding 112 credits to Hoosier Energy after the cut-off date because it would further reduce the 2002 pool of credits. Furthermore, the ELJ finds that the rules provide that the 3,142 ERCs allocated in 2001 shall be submitted to the Federal Environmental Protection Agency March 31, 2002² prior to the August 15 request of Hoosier Energy, and would be withdrawn from the compliance supplement pool.

¹ 326 IAC 10-4-15(b)(1)(F)(ii) The early reduction credit request must be submitted in a format specified by the department, by October 31 of the year in which the NOx emission rate reductions on which the request is based are made or at later date approved by the department.

² 326 IAC 10-4-15 (b)(H) By March 31 of the year following the request, the department shall submit to the U.S. EPA the allocations of NOx allowances determined under clause (G). The U.S. EPA will record the allocations to the extent that they are consistent with the requirements of clauses (B) through (G).

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IDEM relied on the authority of 326 IAC 10-4-15 (b)(1)(F)(ii) to extend the deadline and required no further rulemaking to extend the deadline or to issue the November 28, 2001 Memorandum. The Memorandum provided complete and adequate notification to sources of the extension of the approval deadline that is authorized in the rule. The ELJ finds that IDEM's Memorandum of November 28, 2001 is not a rule in itself, and Hoosier Energy's argument that the Memorandum is a rule must fail.

Hoosier Energy argues the IDEM provided no legitimate basis for its denial of Hoosier Energy's request. The burden of proof that an agency action is invalid is on the party asserting invalidity. Ind. Code § 4-21.5-5-14. Hoosier Energy, however, has completely failed to address the reasons why it failed to meet the deadline of December 31, 2001.

When construing a statute or an administrative regulation, a court is guided by several rules of statutory construction. When a statute is clear and unambiguous, on its face, the court does not and should not interpret the statute. Indiana Department of Natural Resources v. Peabody Coal Company, 654 N.E. 2d 289; 1995 Ind. App. LEXIS 932. In 326 IAC 10-4-15 (b)(1)(F)(ii). IDEM was granted the authority to approve a date later than October 31, 2001 to submit a request for consideration of ERCs and IDEM exercised that authority in setting December 31, 2001 as that later date. No interpretation of the statute is required.

Was it arbitrary and capricious of IDEM to set that date and no other? Indiana Courts have addressed on many occasions the narrow standard of review of an administrative agency decision. An action of an administrative agency can be considered arbitrary and capricious only where there is no reasonable basis for the action. Indiana Civil Rights Commission, et al v. Delaware County Circuit Court, 668 N.E. 2d 1219; 1996 Ind. LEXIS 103. Dicta appearing in Indiana Sugars, Inc. v. State Board of Tax Commissioners, 683 N.E. 2d 1383; 1997 Ind. Tax LEXIS 20, suggests the obvious here, "(d)etermining whether an application was filed on time is very different than deciding to accept or deny something summarily labeled as late-filed. No one doubts that an application that is truly late-filed may be denied". Certainly one of the functions of a state agency is to set time limits and regulations, applicable to all, in order to carry out its duties in an orderly and consistent manner. An established administrative law principle is that state agencies have implicit powers to regulate to effectuate their respective regulatory schemes outlined by statute. Charles A. Beard Classroom Teachers Association et al v. Board of School Trustees of the Charles A. Beard Memorial School Corporation, 668 N.E. 2d 1222; 1996 Ind. Sup. Ct., LEXIS 110.

The reasons expressed by IDEM for setting the December 31, 2001 approval date, as expressed herein, are neither arbitrary nor capricious. Summary judgment is appropriate when the designated evidentiary matter shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Ind. Code § 4-21.5-3-23.

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Conclusions of Law

Based on the foregoing Findings of Fact and Discussion, I conclude, as a matter of law that:

1. The Indiana Office of Environmental Adjudication has jurisdiction over decisions of the Commissioner of the Indiana Department of Environmental Management (IDEM) and the parties to this controversy pursuant to IC § 4-21.5-7.
2. IDEM's letter to Hoosier Energy denying the requested ERCs submitted by Hoosier Energy on August 15, 2001 is a Final Order of the Commissioner and confers jurisdiction to the Office of Environmental Adjudication for review of the order.
3. As per the previous discussion in this Order, no genuine issue of material facts exist in the instant case and IDEM is entitled to judgment as a matter of law. Ind. Code § 4-21.5-3-23.
4. IDEM's action in approving December 31, 2001 for submittal of ERCs was authorized by rule and neither arbitrary nor capricious. 326 IAC 10-4-15 (b)(1)(F)(ii).

You are further advised that, pursuant to Indiana Code §4-21.5-5, this Final Order is subject to judicial review. Pursuant to Indiana 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 4th day of February, 2003 in Indianapolis, IN.

Candace T. Vogel
Environmental Law Judge