

**OBJECTION TO ISSUANCE OF SIGNIFICANT SOURCE MODIFICATION PERMIT  
 NO. T083-23529-0003  
 DUKE ENERGY INDIANA - EDWARDSPORT GENERATING STATION  
 EDWARDSPORT, KNOX COUNTY, INDIANA  
 2011 OEA 166, OEA CAUSE NO.: 08-A-J-4066**

Official Short Cite Name:	DUKE ENERGY - EDWARDSPORT, 2011 OEA 166
OEA Cause No.:	08-A-J-4066
Topics/Keywords:	326 IAC 2-2-5(a) 326 IAC 2-2-2(d)(1) 326 IAC 2-2-1(e)(1)(B) 326 IAC 2-2-1(jj)(6) Significant Source Modification Integrated Gasification Combined Cycle Title V operating permit Best Available Control Technology Clean Air Act Prevention of Significant Deterioration State Implementation Plan Ambient air quality standard Netting analysis Collateral attack Ind. Tr. R. 56(C)
Presiding ELJ:	Catherine Gibbs Mary Davidsen
Party Representatives:	Justin D. Barrett, Esq. Larry J. Kane, Esq. Gregory A. Neibarger, Esq. Robin L. Babbit, Esq. Matthew A. Gemand, Esq. David C. Bender, Esq. Christa Westerberg, Esq. Jerome E. Polk, Esq.
Date of Order:	January 28, 2011
Index Category:	Air
Further Case Activity:	



**INDIANA OFFICE OF ENVIRONMENTAL ADJUDICATION**

Mary Davidsen  
Chief Environmental Law Judge

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STATE OF INDIANA )  
 )  
COUNTY OF MARION )

BEFORE THE INDIANA OFFICE OF  
ENVIRONMENTAL ADJUDICATION

IN THE MATTER OF: )  
 )  
OBJECTION TO ISSUANCE OF SIGNIFICANT )  
SOURCE MODIFICATION PERMIT ) CAUSE NO. 08-A-J-4066  
NO. T083-23529-0003 )  
DUKE ENERGY INDIANA )  
EDWARDSPORT GENERATING STATION )  
EDWARDSPORT, KNOX COUNTY, INDIANA )  
 )  
Sierra Club; Valley Watch, Inc.; Save the Valley, Inc.; )  
Citizens Action Coalition of Indiana, Inc. )  
Petitioners )  
Duke Energy Indiana )  
Permittee/Respondent )  
Indiana Department of Environmental Management )  
Respondent )

**FINDINGS OF FACT, CONCLUSIONS  
OF LAW AND ORDER ON DUKE ENERGY INDIANA'S  
FIRST MOTION FOR SUMMARY JUDGMENT**

This matter having come before the Court on Duke Energy Indiana, Inc.'s First Motion for Summary Judgment, which pleading is a part of the Court's record; and the Court, being duly advised and having read the pleadings, record, evidence, motion, response, and reply now enters the following findings of fact, conclusions of law and order:

**Summary of Decision**

Duke Energy Indiana, Inc. (Duke) moves for summary judgment on Issues 1 and 2 of the Petitioners' Petition for Review. Duke's first argument is that this proceeding is an impermissible usurpation of the IDEM's enforcement authority. For the reasons stated in more detail below, this argument is not persuasive. Duke's second argument is the NRDC has brought an improper collateral attack on the Title V permit issued in 2004. It appears that this argument depends on whether the IDEM, when issuing the Title V permit in 2004, made an affirmative determination that no modifications had been made to the plant that affected the netting analysis conducted by the IDEM in the SSM application review. If so, then the Petitioners, by failing to appeal the issuance of the Title V Permit in 2004, have waived the right to attack that

determination here and summary judgment in Duke's favor is appropriate. However, if no such determination was made, then the Petitioners may object to the IDEM's alleged failure to consider the emissions that resulted from the alleged modifications in its netting analysis and Duke's motion must be denied. As Duke has not submitted sufficient evidence that IDEM made such a determination, then summary judgment must be denied as there is a genuine dispute as to a material fact.

### Statement of Case

1. On January 25, 2008, the Indiana Department of Environmental Management (IDEM) issued Significant Source Modification No. T083-23529-00003 (the "SSM") to Duke Energy Indiana Inc. (Duke) for its Edwardsport Generating Station (EGS). The SSM allowed the modification of the EGS by the construction of an integrated gasification combined cycle (IGCC) electric generating facility with the retirement of existing generating units and their associated equipment.
2. Sierra Club, Valley Watch Inc., Save the Valley, Inc. and Citizens Action Coalition of Indiana, Inc. (collectively the "Petitioners") filed a Verified Petition for Review and for Stay of Effectiveness on February 12, 2008.
3. Duke filed its First Motion for Summary Judgment on September 12, 2008; the Petitioners filed their Response in Opposition to Duke Energy Indiana, Inc.'s First Motion for Partial Summary Judgment on October 10, 2008; the IDEM filed its Concurrence With Duke Energy Indiana, Inc.'s Brief in Support of First Motion for Partial Summary Judgment on October 22, 2008; the Petitioners filed their Reply to Indiana Department of Environmental Management's Concurrence With Duke Energy Indiana, Inc.'s Brief in Support of First Motion for Partial Summary Judgment on December 29, 2009; Duke filed its Reply Brief in Support of First Motion for Partial Summary Judgment on December 30, 2008; and the IDEM filed its Reply in Support of Duke Energy Indiana, Inc.'s First Motion for Partial Summary Judgment on January 9, 2009.
4. The IDEM attached the affidavit of Matt Stuckey to its reply filed on January 9, 2009.
5. On January 14, 2009, the Petitioners filed their motion to strike the affidavit of Matt Stuckey. The IDEM responded on January 22, 2009. The Petitioners replied on January 28, 2009.
6. On March 12, 2009, Catherine Gibbs was appointed adjunct Environmental Law Judge in this matter.
7. Adjunct Environmental Law Judge, Catherine Gibbs, issued an order granting the motion to strike on May 28, 2009.
8. The Petitioners summarize Issues 1 and 2 in their Petition for Review as follows: "Issues 1 and 2 of the Petition seek review of the IDEM's decisions in issuing the PSD permit for

the EGS plant that: (1) the emission reductions from retiring the existing EGS units are all creditable because all such emissions were compliant with all relevant Clean Air Act requirements; and (2) that the existing EGS units' emissions are part of the "baseline" air quality concentration, rather than consuming increment, because the units have not been modified since January 6, 1975." See Petitioners' Response in Opposition to Duke Energy Indiana, Inc.'s First Motion for Partial Summary Judgment, p. 26, Section C.

9. Duke argues that summary judgment is appropriate because the Petitioners' claims (1) "improperly seek an enforcement-oriented investigation of alleged past unpermitted major modification of the existing generating units at EGS<sup>1</sup> and (2) impermissibly mount a collateral attack on the validity of the permit status of those existing generating units." See Duke Energy Indiana, Inc.'s First Motion for Partial Summary Judgment, page 10, section V.

### **Findings of Fact**

1. The IDEM issued Title V Operating Permit No. 083-7243-00003 (the "2004 Permit") to PSI Energy, Inc., Duke's predecessor, on August 10, 2004.
2. On January 25, 2008, the Indiana Department of Environmental Management (IDEM) issued Significant Source Modification No. T083-23529-00003 (the "SSM") to Duke Energy Indiana Inc. (Duke) for its Edwardsport Generating Station (EGS). The SSM allowed the modification of the EGS by the construction of an integrated gasification combined cycle (IGCC) electric generating facility with the retirement of existing generating units and their associated equipment.
3. Sierra Club, Valley Watch Inc., Save the Valley, Inc. and Citizens Action Coalition of Indiana, Inc. (collectively the "Petitioners") filed a Verified Petition for Review and for Stay of Effectiveness on February 12, 2008.
4. The IDEM's netting analysis found that the project will not cause a significant net emissions increase for nitrogen oxides, sulfur dioxide, sulfuric acid mist and beryllium due to emissions decreases attributable to shutdown of the EGS's existing units. Therefore, the SSM does not include BACT<sup>2</sup> limitations for these four pollutants.
5. The IDEM's netting analysis further found that there would be a significant net emissions increase for carbon monoxide (CO), particulate matter of less than 10 microns diameter (PM<sub>10</sub>) and volatile organic compounds (VOCs).
6. The IDEM has not taken any enforcement action against Duke for the modifications that the Petitioners allege were made to EGS without obtaining the proper permits.

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<sup>1</sup> Duke also complains that this results in overly burdensome discovery requests. However, there is a process for challenging discovery and Duke may, of course, use this process if it thinks that discovery is overly burdensome.

<sup>2</sup> Best available control technology.

### Applicable Law

This Court 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). "*De novo* review" means that: "all issues are to be determined anew, based solely upon the evidence adduced at that hearing and independent of any previous findings." *Grisell v. Consol. City of Indianapolis*, 425 N.E.2d 247 (Ind.Ct.App. 1981).

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).

Pursuant to the federal Clean Air Act's Prevention of Significant Deterioration ("PSD") program as implemented through Indiana State Implementation Plan ("SIP"), a major modification<sup>3</sup> is one which will cause a significant emissions increase and a significant net emissions increase. 326 IAC 2-2-2(d)(1). This requires the IDEM to conduct a netting analysis to determine whether such increases will occur. Part of the netting analysis requires a calculation of past excessive emissions. There are two ways in which past excessive emissions must be accounted for in a netting analysis. First, the "baseline actual emissions from which emission changes are calculated, must exclude "any noncompliant emissions ...." 326 IAC 2-2-1(e)(1)(B). Second, emission decreases at the emission source must be creditable - meaning that they can be used to off-set other emission increases in the netting analysis - only to the extent the old emissions are allowable. 326 IAC 2-2-1(jj)(6).

Further, pursuant to 326 IAC 2-2-5(a), before a PSD permit can be issued, the owner or operator of a major modification must demonstrate that:

allowable emissions increases in conjunction with all other applicable emissions increases or reductions (including secondary emissions) will not cause or contribute to air pollution in violation of any:

- (1) ambient air quality standard, as designated in 326 IAC 1-3, in any air quality control region; or
- (2) applicable maximum allowable increase over the baseline concentration in any area as described in section 6 of this rule.

The Petitioners allege that as a result of unpermitted modifications made to EGS, the IDEM failed to properly consider the effect of emissions from these modifications in its netting analysis. In other words, the IDEM's netting analysis incorrectly determined (1) whether the

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<sup>3</sup> None of the parties have argued that EGS is not a major source or that the modifications approved in the SSM are not major modifications.

emissions were noncompliant or creditable and (2) that Duke had not met the required demonstration in 326 IAC 2-2-5(a).

Duke argues that the Petitioners are attempting to bring an enforcement action for these alleged unpermitted modifications. I.C. §13-30-3 provides the mechanism for the IDEM to investigate and pursue enforcement for violations of Title 13. I.C. §13-30-1 provides the mechanism for persons, including citizens of the state, to bring an action for declaratory and equitable relief against entities for “the protection of the environment of Indiana from significant pollution, impairment or destruction.” I.C. §13-30-1-1.

Duke also argues that the Petitioners are attempting to collaterally attack the 2004 Permit issued in 2004. “A collateral attack on a judgment is an attack made in a proceeding that has an independent purpose other than to impeach or overturn the judgment, although impeaching or overturning the judgment may be necessary to the success of the action. *46 Am. Jur. 2d Judgments § 631* (1969); see also *State ex rel. Lacy v. Marion Probate Court* (1962), *243 Ind. 30, 35-36, 182 N.E.2d 416, 418* (defined as attack on judgment outside legally prescribed procedure for judicial review, which attempts to deny its validity, and may necessitate relief from judgment).” *IDEM v. Conard*, 614 N.E.2d 916, 922 (Ind. 1993).

#### Conclusions of Law

1. The Office of Environmental Adjudication (“OEA”) has jurisdiction over the decisions of the Commissioner of the IDEM and the parties to the controversy pursuant to IC § 4-21.5-7-3.
2. Findings of Fact that may be construed as Conclusions of Law and Conclusions of Law that may be construed as Findings of Fact are so deemed.
3. The Petitioners allege that unpermitted modifications were made to EGS and as a result, the IDEM failed to properly consider the emissions from these modifications in conducting the netting analysis. They argue that the IDEM included noncompliant emissions in the baseline actual emissions and that the emission decreases were not creditable. Further, the IDEM considered emissions from the modifications as part of the baseline air quality concentration rather than considering that these emissions consumed increment.
4. Duke’s first argument is that the Petitioners are improperly seeking enforcement of the applicable regulations. Duke does not seek a determination that the modifications did not occur; it seeks a determination that the Petitioners should not be allowed to present evidence that the emissions from the alleged modifications were not considered in the netting analysis. However, this is a mischaracterization of the Petitioners’ claims. It is clear that the IDEM has the discretion to bring enforcement actions and that the OEA may not interfere with the IDEM’s discretion. It is also clear that the Petitioners may bring an action under I.C. §13-30-1 if they so choose. However, the Petitioners are not seeking a determination that Duke violated the regulations or to enforce the regulations, collect penalties, or require Duke take remedial action to correct the alleged violations –

they seek a determination that the decision to issue the SSM approval was improper because the IDEM failed to consider something that it was required by law to consider. Allegations that the IDEM did not comply with the applicable regulations is the basis for every appeal in the Office of Environmental Adjudication. A finding that Duke was in violation of various regulations is not critical to the determination that the IDEM failed to properly consider the alleged modifications in calculating the netting analysis. The Petitioners argue that the IDEM failed to perform an adequate review of the SSM application in that it failed to consider the effect of the modifications on the baseline concentration and whether emissions from the alleged previous modifications are compliant and creditable. This is a fine line to draw, but, under the standard of review for summary judgment, the facts must be construed in favor of the Petitioners as the non-movants. To the extent that the Petitioners seek enforcement relating to alleged violations, this is neither the appropriate forum nor method for doing so. However, having concluded that this is not the Petitioners' goal, Duke's argument that summary judgment should be entered on Issues 1 and 2 for this reason is not persuasive.

5. The Petitioners argue that the IDEM failed to properly consider the emissions from the alleged modifications in calculating the netting analysis. This issue revolves around a question of material fact, that is, whether the IDEM made an affirmative determination that the alleged prior modifications were proper. The fact that the IDEM has not taken enforcement action does not mandate a finding that this determination was made.
6. Duke also argues that the Petitioners are attempting to collaterally attack the 2004 Permit. To the extent that the Petitioners are attempting to attack the 2004 Permit, this is clearly an impermissible collateral attack. The time for appealing the 2004 permit has passed. However, as the Petitioners point out, the SSM replaces the 2004 Permit. Any revisions that the OEA deems necessary would be made to the SSM. In addition, as the IDEM did not make a specific determination regarding whether modifications had been made, either through an enforcement action or in the 2004 Permit itself, the alleged modifications were not an issue until the SSM was issued and the IDEM conducted its netting analysis. Therefore, the Petitioners raised the issue of whether the emissions from the alleged modifications were properly considered when this question became relevant, that is, when the SSM was issued. The OEA concludes that the Petitioners are not seeking to collaterally attack the 2004 Permit. Summary judgment in Duke's favor is not appropriate.
7. Both Duke and the IDEM argue that the Petitioners' lack of participation in the public comment process bars them from petitioning for administrative review. However, the OEA finds this to be irrelevant. Neither Duke nor the IDEM have been able to point to any statute or regulation (and the OEA has been unable to find any) that require a person to comment in order for that person to object to the issuance of a permit. Regardless of any hypothetical policy considerations, the OEA will not impose any prerequisites to objecting to an agency action not required by the applicable statutes and regulations.

**ORDER**

**AND THE COURT**, being duly advised, hereby **ORDERS, ADJUDGES AND DECREES** that Duke Energy Indiana Inc.'s First Motion for Partial Summary Judgment is **DENIED**.

You are further notified that pursuant to provisions of IC §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 an order subject to further review consistent with applicable provisions of IC §4-21.5 and other applicable rules and statutes.

**IT IS SO ORDERED** this 28<sup>th</sup> day of January, 2011 in Indianapolis, IN.

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Catherine Gibbs  
Adjunct Environmental Law Judge

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Mary Davidsen  
Chief Environmental Law Judge