

**In re: Objection to the Issuance of Part 70 Operating Permit No. T-137-6928-00011
for Joseph E. Seagram & Sons, Inc., Ripley County, Indiana
2004 OEA 58 (03-A-J-3003)**

TOPICS:

summary judgment
Part 70
air permits
major sources
deference to agency
whiskey warehouses
fugitive emissions
statutory construction
functionally equivalent openings,
reasonably collected

PRESIDING JUDGE:

Gibbs

PARTY REPRESENTATIVES:

Permittee: Anthony C. Sullivan, Esq., Bryan G. Tabler, Esq., Barnes & Thornburg
IDEM: April Schultheis, Esq.

ORDER ISSUED:

August 4, 2004

INDEX CATEGORY:

Air

FURTHER CASE ACTIVITY:

[none]

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STATE OF INDIANA)
)
COUNTY OF MARION)

BEFORE THE INDIANA OFFICE OF
ENVIRONMENTAL ADJUDICATION

IN THE MATTER OF:)
)
OBJECTION TO THE ISSUANCE OF)
PART 70 OPERATING PERMIT)
NO. T-137-6928-00011 FOR)
JOSEPH E. SEAGRAM & SONS, INC.)
RIPLEY COUNTY, IN)

CAUSE NO. 03-A-J-3003

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND FINAL ORDER**

This matter having come before the Court on the Motion for Summary Judgment filed by the Indiana Department of Environmental Management (the “IDEM”) and on the Cross Motion for Summary Judgment filed by Joseph E. Seagram & Sons, Inc. (the “Petitioner”), which pleadings are a part of the Court’s record; and the Environmental Law Judge (“ELJ”) having read and considered the petitions, motions, record of proceedings, evidence, and the briefs, responses and replies of the parties, now finds that judgment may be made upon the record; and the ELJ, by a preponderance of the evidence and being duly advised, now makes the following findings of fact and conclusions of law and enters the following Order:

FINDINGS OF FACT

1. 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.
2. The IDEM issued Part 70 Operating Permit No. T-137-6928-00011 to the Petitioner on December 23, 2002 for the facility located on Highway 350 West, Milan, Indiana (the “Facility”).
3. The Petitioner filed its Petition for Review on January 22, 2004. This Petition is timely filed.
4. IDEM filed its Motion for Summary Judgment on February 26, 2004. The Petitioner filed Seagram’s Response to IDEM’s Motion for Summary Judgment and Seagram’s Cross-Motion for Summary Judgment on April 19, 2004.
5. Pursuant to Stipulations of Fact filed by IDEM on February 26, 2004, the only issue before this Court is whether this Facility is a major source under the regulations in 40 CFR Part 70 and therefore, requires an Part 70 operating permit.

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6. It is undisputed by the parties that:
- a. The Facility consists of 10 whiskey warehouses used to store whiskey in barrels for aging.
 - b. Ventilation in the warehouse is provided by 17 inch by 48 inch screen-covered openings along the bottom of the warehouse walls.
 - c. The Facility relies on natural ventilation and does not use fans to force air in or out of the warehouse.
 - d. The Facility emits over 100 tons per year (tpy) ethanol emissions. Ethanol is a regulated volatile organic compound (VOC).
7. In addition, this Court finds:
- a. The warehouses are not heated or cooled. Temperature and humidity inside the warehouses follow the outside environment.
 - b. Throughout the course of the year, the wind direction and speed change considerably, resulting in constantly changing ventilation rate and conditions. Air may enter, or ethanol emissions and air may exit, the same opening, depending on which way the wind is blowing at any given time.
 - c. The barrel environment is critical in whiskey aging. Ambient atmospheric conditions, such as seasonal variation in temperature and humidity, have a great effect on the aging process. The equilibrium concentrations of the various whiskey components depend heavily on the airflow around the barrel. Each distiller depends upon these variables to produce its distinctive brand with its own taste, color, and aroma. United States Environmental Protection Agency (US EPA) Emission Factor Documentation for AP-42, Section 9.12.3 Distilled Spirits, Final Report (March 1997). Affidavit of William M. Burch, Exhibit A to Seagram's Response to IDEM's Motion for Summary Judgment and Seagram's Cross-Motion for Summary Judgment.
 - d. The only full scale test reported in the literature in which whiskey warehouse emissions were collected for air pollution control purposes was an experiment with carbon adsorption described in EPA's 1978 *Cost and Engineering Study Control of Volatile Organic Emissions for Whiskey Warehousing* (*supra* at n. 3). The report concluded:

The cost problems discussed above and the failure of the full-scale test show that control of emissions from whiskey warehousing has not been demonstrated at this time.

EPA *Cost and Engineering Study* at p. 1-4; *see also id.* at p. 4-14. In both the 1978 *Cost and Engineering Study* and again in its consideration of pollution control technology for New Source Performance Standards for storage vessels, EPA concluded that available emission control technology "could contaminate beverage alcohol resulting in a produce with little or no market value." 52 Fed.Reg. 11420, 11424 (Apr. 8, 1987).

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- e. No whiskey aging facility in the United States controls ethanol emissions. Affidavit of William M. Burch, Exhibit A to Seagram's Response to IDEM's Motion for Summary Judgment and Seagram's Cross-Motion for Summary Judgment.
 - f. As of October 23, 2000, the U.S. EPA had not identified any reasonably available control technology (RACT) for ethanol emissions from alcohol beverage aging warehouses. U.S. EPA letter to Senator Robert C. Smith, Chairman of the Senate Committee on Environment and Public Works, page 1 (October 23, 2000), Exhibit J to Seagram's Response to IDEM's Motion for Summary Judgment and Seagram's Cross-Motion for Summary Judgment.
 - f. Collecting and controlling emissions from whiskey aging facilities is generally considered incompatible with maintaining product quality. Affidavit of William M. Burch, Exhibit A to Seagram's Response to IDEM's Motion for Summary Judgment and Seagram's Cross-Motion for Summary Judgment.
8. The VOC emissions from the Facility are fugitive emissions.

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. A facility is a major source under the Clean Air Act if it emits more than 100 tpy VOCs, *excluding fugitive emissions*. 326 IAC 2-7-1(22)(B). The critical issue in determining whether this Facility is a major source is whether the VOC emissions are "fugitive emissions" as defined by 40 CFR § 70.2 and 326 IAC 2-7-1(18). "Fugitive emissions" are defined as "emissions which could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening." The initial question is how should this definition be construed? Neither the IDEM nor the Petitioner have cited to any binding precedent regarding the statutory construction of this regulation.
3. The same rules that govern construction of statutes also govern construction of rules. As the court stated in *Miller Brewing Co. v. Bartholomew County Beverage Cos., Inc.*, 674 N.E.2d 193 (Ind. Ct. App. 1996):

Our inquiry into the meaning of Rule 28's prohibition ... begins with a recognition that rules which apply to the construction of statutes also apply to the construction of administrative rules and regulations. *Indiana Dep't of Natural Resources v. Peabody Coal Co.* (1995) Ind. App., 654 N.E.2d 289. Of course, properly adopted administrative rules and regulations have the force and effect of law. *Dep't of Fin. Inst. v. Johnson Chev. Co.* (1950) 228 Ind. 397, 92 N.E.2d 714.

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4. The rules of statutory construction state, “If a statute is subject to interpretation, our main objectives are to determine, effect, and implement the intent of the legislature in such a manner so as to prevent absurdity and hardship and to favor public convenience.” *State v. Evans*, 790 N.E.2d 558, 560 (Ind. App., 2003).
5. The appellate courts in Indiana consistently hold that an agency’s interpretation of a statute is entitled to deference. The Court in *Shaffer v. State*, 795 N.E.2d 1072, 1076 (Ind.Ct.App. 2003) stated, “When a statute is subject to different interpretations, the interpretation of the statute by the administrative agency charged with the duty of enforcing the statute is entitled to great weight, unless that interpretation is inconsistent with the statute itself.”
6. U.S EPA’s interpretation of its own regulations is entitled to controlling weight. The Supreme Court has articulated the following principle of judicial deference to a consistent, longstanding interpretation of an agency’s own rules by its highest officials:

We must give substantial deference to an agency’s interpretation of its own regulations. *Martin v. Occupational Safety and Health Review Comm’n*, 499 U.S. 144, 150-151, 111 S.Ct. 1171, 1175-1176, 113 L.Ed.2d 117 (1991); *Lyng v. Payne*, 476 U.S. 926, 939, 106 S.Ct. 2333, 2341, 90 L.Ed.2d 921 (1986); *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616(1965). Our task is not to decide which among several competing interpretations best serves the regulatory purpose. Rather, the agency’s interpretation must be given “controlling weight unless it is plainly erroneous or inconsistent with the regulation.” *Ibid.* (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945)). In other words, we must defer to the Secretary’s interpretation unless an “alternative reading is compelled by the regulation’s plain language or by other indications of the Secretary’s intent at the time of regulation’s promulgation.” *Gardebring v. Jenkins*, 485 U.S. 415, 430, 108 S.Ct. 1306, 1314, 99 L.Ed.2d 515 (1988). This broad deference is all the more warranted when, as here, the regulation concerns “a complex and highly technical regulatory program,” in which the identification and classification of relevant “criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.” *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697, 111 S.Ct. 2524, 2534, 115 L.Ed.2d 604 (1991).

7. This Court does not have any difficulty agreeing with IDEM’s contention that the openings in the warehouses are “functionally equivalent openings”. The first rule is that when a statute or regulation is clear and unambiguous on its face, the court does not need to “apply any rules of construction other than to require that words and phrases be taken in their plain, ordinary and usual sense.” *St. Vincent Hosp. & Health Care Ctr., Inc. v. Steele*, 766 N.E.2d 699, 703-704 (Ind. 2002). The regulation states that fugitive emissions are those that cannot “reasonably pass through a stack, chimney, vent, or other

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functionally equivalent opening.” The warehouse openings are clearly not stacks or chimneys, but they are functionally equivalent to vents. Merriam-Webster Dictionary defines “vent” as “an opening for the escape of a gas or liquid or for the relief of pressure.” *Merriam-Webster On-line Dictionary*, www.m-w.com/cgi-bin/dictionary. Giving the words of the regulation their plain and ordinary meaning, these openings are the functional equivalent of vents. However, the analysis does end at this point. The word “reasonably” must be construed.

8. IDEM urges this Court to construe the word “reasonably” broadly and argues that the mere fact that the emissions pass through the opening is enough to determine that the emissions are not fugitive. However, if this were true, then the word “reasonably” has no meaning. Statutes and rules must be read as a whole. “We ‘presume that the legislature did not enact a useless provision’.” *State v. Evans*, 790 N.E.2d 558, 560 (Ind. App., 2003) (citing *Moons v. Keith*, 758 N.E.2d 960, 965 (Ind. Ct. App. 2001)).
9. This Court concludes that whether the emissions can be reasonably *collected* is essential to the determination of whether the emissions are fugitive. This Court finds and concludes that the IDEM’s interpretation is inconsistent with the regulation and with U.S. EPA’s national policy for the following reasons.
10. The preamble to the U.S. EPA’s original 1980 promulgation of the definition for “fugitive emissions” states:

EPA has considered comments with respect to the proposed definition of “fugitive emissions,” and has determined that one change is appropriate. Instead of defining fugitive emissions as “those emissions which *do not* pass through a stack, chimney, vent, or other functionally equivalent opening,” EPA believes that the term should apply to “those emissions which *could not reasonably pass* through a stack, chimney, vent, or other functionally equivalent opening.” This change will ensure that sources will not discharge as fugitive emissions those emissions which would ordinarily be collected and discharged through stacks or other functionally equivalent openings, and will eliminate disincentives for the construction of ductwork and stacks for the collection of emissions. Emissions which could reasonably pass through a stack, chimney, vent, or other functionally equivalent opening will be treated the same as all other point emissions for threshold calculation purposes.

45 Fed.Reg. 52692-93 (Aug. 7, 1980). This reinforces the idea that the collection of emissions is an important variable in the definition of “fugitive emissions”.

11. The Memorandum, dated February 10, 1999, from Thomas C. Curran to Judith Katz (the “Curran Memo”), submitted as Attachment B to IDEM’s Motion for Summary Judgment and as Exhibit G to the Petitioner’s Motion for Summary Judgment sets out the factors to be considered in determining whether emissions are fugitive. The Curran Memo

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indicates that the U.S. EPA's national policy is that each Region must perform a factual case-by-case analysis to determine whether the emissions are fugitive. Implicit in this analysis is an inquiry into whether the emissions can be *reasonably collected*.

12. The Curran Memo states what factors should be analyzed to determine if emissions can be "reasonably collected". At a facility where emissions are not actually collected, this inquiry should include an analysis of (1) the reasonableness of collection, including, but not limited to, cost considerations; (2) whether similar facilities "are subject to national standards and State implementation plan (SIP) requirements (e.g., reasonably achievable control technology, best available control technology, or lowest achievable emission rate) requiring collection, and (3) whether similar sources actually collect emissions.
13. The regulation specifically states that emissions that can "reasonably pass through a stack, chimney, vent, or other functionally equivalent opening" are not fugitive. This Court agrees with the District Court's statement in *United States v. Nucor Corp.*, 17 F.Supp.2d 1249 (M.D. Ala. 1998), "The court cannot imagine any emission in a gaseous state which could not pass through such an opening." If one examines the documents submitted and cited by the parties, it is clear that the U.S. EPA contemplates that whether the emissions can be reasonably *collected* is the main consideration in the analysis. The Court finds the Court's statement in *Nucor*, "If all the plaintiff had to prove is that gasses in a gaseous state can pass through a hole, the plaintiff should perhaps prevail." to be particularly applicable here.
14. While not binding, this Court finds that the United States District Court's opinion in *Nucor* to be very persuasive. The District Court states, "The court initially notes that it cannot accept plaintiff's explicit and implicit argument that all emissions which can pass through a stack, vent, etc. are, ergo, non-fugitive emissions. The court cannot imagine any emission in a gaseous state which could not pass through such an opening. The regulation must contemplate some means of collection, direction and discharge, just as the preamble to the EPA regulation provides." At 1250.
15. The District Court also states "The issue was whether the emissions were fugitive. This required that the plaintiff prove that there was a reasonable system to collect and discharge, not just whether or not gasses can physically pass through a hole." *Id.* At 1250. In accordance with U.S. EPA's interpretation as stated in the Curran Memo and with the *Nucor* case, whether the emissions can be reasonably collected is the question that must be answered.
16. The only question now remaining is a factual one, that is, whether the emissions from this Facility can be reasonably collected as they pass through the openings in the warehouses. The Curran Memo provides the analysis that IDEM or Region V should have performed in determining that these emissions were non-fugitive.
17. 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

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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 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).

18. The OEA may enter summary 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." IC 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).
19. The IDEM argues that the openings in the warehouses are functionally equivalent openings and the fact that the emissions pass through these openings means that these emissions are fugitive. This argument is based on the United States Environmental Protection Agency (U.S. EPA), Region V's letter dated April 16, 1996 to Paul Dubenetzky from Cheryl Newton (the "Region V Letter").
20. It is not clear from the Region V Letter what analysis Region V undertook to determine whether these emissions were fugitive. The letter states "Region V has carefully reviewed the facts of this case and relevant regulation and guidance and confirms that our position on this issue is correct." Neither IDEM nor Region V has presented the supporting evidence for this conclusion. Attempts to obtain the supporting documentation by the Petitioner's attorney were unsuccessful. Exhibit H, Seagram's Response to IDEM's Motion for Summary Judgment and Seagram's Cross-Motion for Summary Judgment.
21. The Petitioner has presented extensive evidence regarding the whiskey aging process and the effect the collection of ethanol emissions would have on this process. The Petitioner has shown by a preponderance of the evidence that the collection of the ethanol emissions would negatively affect product quality. The Petitioner has also presented sufficient evidence to prove that such emissions are not collected at other similar facilities and that U.S. EPA has not identified any reasonably available control technology (RACT) for ethanol emissions from alcohol beverage aging warehouses.
22. Based on the evidentiary matter before it, this Court concludes that there is no genuine issue to any material fact. The Petitioner has met its burden of proof by a preponderance of the evidence in this matter. The emissions from the Facility are fugitive emissions,

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therefore the Facility is not a major source under 40 CFR § 70.2 or 326 IAC 2-7-1(22) and it is not required to obtain a permit under 40 CFR Part 70 or 326 IAC 2-7.

ORDER

AND THE COURT, being duly advised, hereby **ORDERS, JUDGES AND DECREES** that the Petitioner's Cross Motion for Summary Judgment is **GRANTED** and IDEM's Motion for Summary Judgment is **DENIED**. The Commissioner is ordered to rescind the Part 70 Operating Permit No. T-137-6928-00011 for the facility located on Highway 350 West, Milan, Indiana.

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 4th day of August, 2004.

Catherine Gibbs
Environmental Law Judge