

**Objection to the Issuance of MSOP
New Source Construction
Permit No. 137-40667-00051
MGPI of Indiana Inc.
2020 OEA 9 (19-A-J-5061)**

OFFICIAL SHORT CITATION NAME: When referring to 2020 OEA 9, cite this case as **MGPI, 2020 OEA 9.**

Topics:

Summary judgment

New Construction and Minor Source Operating Permit

MSOP

Whiskey aging

Angel's Share

Fugitive Emissions

Objection to the Issuance of Part 70 Operating Permit No. T-137-6928-00011, Joseph E.

Seagram & Sons, Inc., 2004 OEA 58

Best Available Control Technology

BACT

RACT/BACT/LAER Clearinghouse

RBLC

I.C. §4-21.5-3-27(c)

326 IAC 8-1-6

U.S. EPA New Source Review Workshop Manual (Draft Oct. 1990)

United States v. Minnkota Power Coop., Inc. 831 F. Supp. 2d 1109, 1113-1114 (D.N.D. 2011)

Presiding Environmental Law Judge: Catherine Gibbs

Party representatives:

IDEM:

Clark Kirkman

Petitioners: Ruth Rielhe, Carol Eckstein:

David Dearing

Respondent, MGPI of Indiana, Inc.:

Anthony Sullivan

Order issued: July 2, 2020

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 MSOP)
NEW SOURCE CONSTRUCTION) CAUSE NO. 19-A-J-5061
PERMIT NO. 137-40667-00051)
MGPI OF INDIANA, LLC)
SUNMAN, RIPLEY COUNTY, INDIANA)
_____)
Ruth Riehle, Carol Eckstein)
Petitioners)
MGPI of Indiana LLC)
Permittee/Respondent)
Indiana Department of Environmental Management)
Respondent)

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

MGPI of Indiana LLC (the Permittee), Ruth Riehle and Carol Eckstein (Petitioners) and the Indiana Department of Environmental Management (IDEM) each filed motions for summary judgment. The Office of Environmental Adjudication (the OEA), having read the motions, responses, and replies, now enters the following findings of fact, conclusions of law and order.

Findings of Fact

1. On April 10, 2018, IDEM issued a New Construction and Minor Source Operating Permit, No. M137-40667-00051 (the Permit) to the Permittee, authorizing the construction and operation of a distilled spirits aging warehouse facility (the Facility) located at 924 and 932 South Meridian Street, Sunman, Indiana. The Facility would consist of two warehouse structures to store barrels of distilled spirits products for aging purposes.
2. Ruth Riehle filed a petition for review on April 22, 2019. She owns property within 1000 feet of the Facility.
3. Carol Eckstein sent a petition for review to OEA via U.S. Mail, postmarked April 22, 2019. This petition was not delivered to OEA, but was mistakenly delivered to IDEM. While the salutation on the petition was to an IDEM employee, Jenny Acker, the address on the envelope was OEA's address. On May 15, 2019, at the prehearing conference, counsel for

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IDEM, Clark Kirkman, produced the Eckstein petition for review. The petition for review was entered into the record as filed on April 22, 2019, in accordance with 315 IAC 1-3-3(c)(2).

4. A prehearing conference was held on May 15, 2019. Neither Petitioner appeared. IDEM and MGPI appeared by counsel. David Dearing appeared via telephone for certain unidentified Petitioners.
5. Pursuant to the Prehearing Conference Report and Order to Submit Status Report, issued on May 15, 2019, Mr. Dearing was ordered to notify the ELJ whether he represented either Ruth Riehle or Carol Eckstein. On May 29, 2019, Mr. Dearing filed his appearance for Ruth Riehle and Carol Eckstein.
6. On August 15, 2019, OEA issued Findings of Fact, Conclusions of Law and Orders, dismissing Petitioners, Ruth Riehle's and Carol Eckstein's allegations of error except for the allegations relating to fugitive emissions. Petitioners request that technology be installed to control fugitive ethanol emissions. Petitioners, in their responses to the Motion to Dismiss, identified 326 IAC 2-5.1-3¹ and 326 IAC 8-1-6² as the applicable regulations which the Permit did not meet.
7. The Facility will emit volatile organic compounds (VOCs), specifically, ethanol, as a result of the whiskey aging process.
8. IDEM, in compliance with *Objection to the Issuance of Part 70 Operating Permit No. T-137-6928-00011, Joseph E. Seagram & Sons, Inc.*, 2004 OEA 58, determined the ethanol emissions to be fugitive emissions.
9. IDEM did not require Permittee to do a BACT analysis. IDEM reviewed the EPA³ RACT⁴/BACT⁵/LAER⁶ Clearinghouse and determined that there was no emission control technology in use at whiskey aging warehouses in the United States. IDEM did not identify nor require any best available control technology (BACT) for the fugitive emissions from this Facility.
10. Petitioners did not identify any RACT for whisky aging warehouses.

¹ New source permit requirements.

² Requiring certain facilities to use best available control technologies (BACT) to control volatile organic compounds (VOC) emissions.

³ United States Environmental Protection Agency.

⁴ Reasonably available control technology

⁵ Best available control technology

⁶ Lowest achievable emission rate

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11. All parties filed motions for summary judgment on March 13, 2020. All parties filed responses on April 17, 2020 and replies were filed on May 14, 2020.

Conclusions of Law

1. The OEA has jurisdiction over the decisions of the Commissioner of the Indiana Department of Environmental Management (“IDEM”) pursuant to Indiana Code (I.C.) § 4-21.5-7, et seq.
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 OEA shall consider a motion for summary judgment “as would a court that is considering a motion for summary judgment filed under Trial Rule 56 of the Indiana Rules of Trial Procedure.” I.C. § 4-21.5-3-23. Ind. Trial Rule 56 states, “The judgment sought shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” 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).
4. Each party has requested summary judgment in this matter. “The fact that both parties requested summary judgment does not alter our standard of review. Instead, we must separately consider each motion to determine whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law.” *Laudig v. Marion County Bd. of Voters Registration*, 585 N.E.2d 700, 703-704, (Ind. Ct. App. 1992) *see also; Five Star Concrete, L.L.C. v. Klink, Inc.*, 693 N.E.2d 583, 585 (Ind. Ct. App. 1998).
5. The OEA and IDEM, as state agencies, only have the authority to take those actions that are granted to them by the law. “An agency, however, may not by its rules and regulations add to or detract from the law as enacted, nor may it by rule extend its powers beyond those conferred upon it by law.” *Lee Alan Bryant Health Care Facilities, Inc. v. Hamilton*, 788 N.E.2d 495, 500 (Ind. Ct. App. 2003). IDEM can only determine whether a permit should be issued by applying the relevant statutes and regulations and may only consider those factors specified in the applicable regulations in deciding the terms and conditions of the permit. As the ultimate authority for the IDEM, the OEA’s authority is limited by statute (I.C. §4-21.5-7-3) to determining whether the IDEM decision complies with the applicable statutes and regulations. If the IDEM does not have the regulatory authority to address certain issues, the OEA does not have the authority to revoke a permit on the basis that IDEM failed to consider these issues. OEA is an impartial litigation forum, not a body

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which formulates or advises as to public policy or regulatory content.

6. I.C. §4-21.5-3-27(c) states: “Conclusions of law must consider prior final orders (other than negotiated orders) of the ultimate authority under the same or similar circumstances if those prior final orders are raised on the record in writing by a party and must state the reasons for deviations from those prior orders.” The presiding Environmental Law Judge issued Findings of Fact, Conclusions of Law and Final Order in a matter that directly dealt with the issue of fugitive emissions from a whiskey aging facility. That case is *Objection to the Issuance of Part 70 Operating Permit No. T-137-6928-00011, Joseph E. Seagram & Sons, Inc.*, 2004 OEA 58. The presiding ELJ in *Seagram* decided, for purposes of calculating potential emissions⁷, that the ethanol emissions from whisky aging were fugitive emissions as they could not be reasonably collected. This case was not vacated or overruled and must be considered as precedent as to the question of whether the ethanol emissions are fugitive emissions. Further, the pertinent laws or rules upon which this decision was based have not changed. Petitioners argue that this case should not be considered as precedent because one of the cases⁸ the ELJ found persuasive was subsequently vacated. However, this argument is not convincing for the reasons argued by IDEM⁹ - (1) that the *Nucor* case was not overruled but vacated because of settlement; and (2) that the ELJ did not rely on *Nucor* as binding precedent but merely persuasive. The ELJ concludes that the holding in *Seagram* (that the emissions from whisky aging are fugitive emissions) should apply in this case.
7. The question here then is whether IDEM failed to comply with the law by not including BACT for the fugitive emissions which will be emitted by this Facility. 326 IAC 2-5.1-3 requires that new facilities with the potential to emit air emissions above certain limits obtain a permit to construct. 326 IAC 8-1-6 requires that new facilities that will have potential emissions above a certain limit “shall reduce VOC emissions using best available control technology (BACT).”
8. It is generally accepted and is standard procedure that, in order to produce good quality whiskey, it must be aged by exposing it to ambient air conditions, including temperature and humidity.
9. The U.S. EPA addresses when a technology will be considered BACT. “A control technique is considered available, within the context presented above, if it has reached the licensing and commercial sales stage of development. A source would not be required to experience extended time delays or resource penalties to allow research to be conducted on a new technique. Neither is it expected that an applicant would be required to experience

⁷ IDEM determined that the Seagram site was a major source and required a Title V permit because it counted the ethanol emissions as potential emissions and not as fugitive emissions.

⁸ *United States v. Nucor Corp.*, 17 F.Supp.2d 1249 (M.D. Ala. 1998).

⁹ See Indiana Department of Environmental Management’s Reply in Support of Its Motion for Summary Judgment, pg. 2.

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extended trials to learn how to apply a technology on a totally new and dissimilar source type. Consequently, technologies in the pilot scale testing stages of development would not be considered available for BACT review.” U.S. EPA New Source Review Workshop Manual (Draft Oct. 1990), at B.17.

10. Further, the analysis in *United States v. Minnkota Power Coop., Inc.* 831 F. Supp. 2d 1109, 1113-1114 (D.N.D. 2011) of when a technology should be considered as BACT is persuasive. The Court stated:

In Step One, the permitting authority lists all "potentially available" control options - those that have a "practical potential for application to the emissions unit and the regulated pollutant under evaluation." In Step Two, the permitting authority eliminates "technically infeasible" control options from the list of "potentially available" control options. A control option is "technically feasible" if it has been "demonstrated" *or* if it is *both* "available" and "applicable." A control option is "demonstrated" if it "has been installed and operated successfully on the type of source under review." A control option is "available" if it "can be obtained by the applicant through commercial channels or is otherwise available within the common sense meaning of the term." A control option is 'applicable' if it can reasonably be installed and operated on the source type under consideration."

11. Petitioners contend that the Permit should be overturned because IDEM failed to (1) require a BACT analysis; and (2) require the use of BACT. First of all, the plain language of the rule does not require a BACT analysis. Second, while the rule specifies that BACT will be used, in this instance, there is no BACT that can be used. Specifically, Petitioners point to the various methods identified by their expert, Matthew Miles, as potential BACT that could be used in this Facility. While there is evidence that these technologies could be used to collect fugitive emissions in other industries, there is no evidence that these technologies have been effectively used in whiskey warehouses. There is no evidence that these technologies have even been *tested* in this setting. Further, the method of collecting the emissions for treatment seems to be a moving target, as demonstrated by the Petitioners reliance on Mr. Miles's affidavit attached to the Petitioners' response brief, which suggests for the first time in any detail that a fume hood could be used. Mere speculation does not constitute sufficient evidence. Petitioners' belief that there is a technically feasible commercially available technology for use in a whiskey aging warehouse through which the fugitive emissions are capable of being captured is not supported by the evidence. Petitioners have not shown that there is a control option that has been if it "has been installed and operated successfully on the type of source under review."¹⁰ Further,

¹⁰ *Minnkota Power Coop.* at 1113.

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Petitioners have not shown that there are any available or applicable commercial technologies. There is no BACT available for this Facility.

12. There is no genuine issue of material fact in this matter. Summary judgment in IDEM's and Permittee's favor is appropriate.

Final Order

IT IS ORDERED, ADJUDGED AND DECREED that the Indiana Department of Environmental Management's and MGPI of Indiana LLC's motions for summary judgment are **GRANTED**

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 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 this 2nd day of July, 2020 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge