IN RE INDIANAPOLIS POWER & LIGHT COMPANY

CAA Appeal No. 95-1

ORDER AFFIRMING PERMIT

Decided May 15, 1995

Syllabus

Indianapolis Power & Light (IPL) has appealed to the Board a phase I acid rain permit issued to it by U.S. EPA Region V under Title IV of the Clean Air Act, 42 U.S.C. § 7651 *et seq.* More particularly, IPL challenges the Region's calculation of extension allowances for sulfur dioxide for 1995 and 1996 at IPL's Petersburg plant. That calculation uses, among other data, a unit's sulfur dioxide emissions during 1988 and 1989. The Region used the plant's actual emissions for that period, while IPL asserts that the Region should have made an "equitable adjustment" to the data to account for an unusual six-month outage during that time. If such an adjustment were made, a projected higher level of emissions would have been used in the calculation, resulting in a greater number of calculated extension allowances. IPL argues that since the applicable regulation is silent on the issue of adjustments, the Region had the authority to make such an adjustment under the regulation. Alternatively, IPL argues that the Region could and should deviate from the "strict language" of the regulation if necessary to grant the requested relief. (IPL was not actually allocated any extension allowances by Region V because the reserve to cover such allowances nationwide was oversubscribed and IPL was unsuccessful in the lottery that was used to distribute the allowances. However, IPL did receive allowances through a private utilities pooling group and its allocation was based on the level of extension allowances for which EPA calculated IPL was eligible. Thus, IPL claims it was harmed by the Region's allegedly erroneous calculation.)

The Agency's Office of General Counsel (OGC) filed a Motion to Dismiss the petition for review, arguing that the Board did not have jurisdiction to consider it. OGC argues that the allocation method is defined by regulation, that IPL is in effect challenging this regulation, and that the Board lacks jurisdiction to consider any challenge to a regulation.

Held: IPL's appeal is of the permit implementing the acid rain regulations rather than of the regulations themselves. Therefore, the Board has jurisdiction to consider it. However, the Region's actions are fully consonant with the applicable regulation, 40 C.F.R. § 72.42(c)(3). The regulation clearly does not contemplate any adjustments to the actual emissions data. Further, IPL's argument that the Agency can deviate from the regulation is inextricably intertwined with IPL's challenge to the regulation itself and thus will not be considered by this Board. Therefore, the permit as issued is affirmed.

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge Reich:

This case arises from a petition for review of phase I acid rain permits issued by U.S. EPA Region V to Indianapolis Power & Light's (IPL) Petersburg and H.T. Pritchard plants. IPL filed this petition pursuant to 40 C.F.R. § 78.20.[1] Initially, the petition raised five issues for review. However, on March 16, 1995, IPL moved to dismiss four of the five issues, on the grounds that those issues had been mooted by subsequent EPA action on the acid rain NO_x regulations. IPL's unopposed motion is hereby granted, and this decision will therefore address only the one remaining issue. As stated in IPL's Appeal and Petition for Review (IPL Appeal Brief), this issue is "[w]hether an equitable adjustment for IPL's Petersburg Unit 2 extension allowances should have been provided by EPA in the Petersburg Unit 2 acid rain permit?" IPL Appeal Brief at 3. We find that the Region did not err in denying such an adjustment.

I. *BACKGROUND*

The Clean Air Act Amendments of 1990 added a new Title IV which is designed to reduce emissions of pollutants contributing to the problem of acid deposition (often referred to as "acid rain"). The pollutant at issue in this appeal is sulfur dioxide. Title IV mandates a phased implementation of a national cap of 8.90 million tons of sulfur dioxide emissions per year from electric utility plants. CAA § 403(a)(1), 42 U.S.C. § 7651b(a)(1). In the first phase, beginning on January 1, 1995, and extending through 1999, limits are imposed upon the 110 largest sulfur-emitting electric utility plants. CAA § 404(a), 42 U.S.C. § 7651c(a). IPL's Petersburg plant is one of the plants regulated during phase I. As such, IPL sought and received a phase I permit for this plant, which is the subject of this appeal.

The reduction of sulfur dioxide emissions will be effectuated by giving the affected units "allowances," which will then determine the amount of annual sulfur dioxide emissions the unit will be entitled to emit during phase I. The nationwide total of these allowances is set at a level to result in an annual sulfur dioxide emissions reduction of 50% when fully implemented.

As previously noted, the compliance date for phase I was January 1, 1995. However, the Act also provides for a two-year "extension" for

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[1] Notice of the filing of this petition was published in the *Federal Register* pursuant to 40 C.F.R. § 78.9 on April 11, 1995. 60 Fed. Reg. 18,402. No motions to intervene were filed within 30 days of the date of publication as permitted by 40 C.F.R. § 78.11(a).

units utilizing a qualifying phase I technology.[2] While this "extension" does not in fact change the compliance deadline, it does provide a unit with extra allowances, entitling it to emit a greater amount of sulfur dioxide during this two-year period. CAA § 404(d), 42 U.S.C. § 7651c(d).

IPL applied for an extension, and it is uncontested that it met the eligibility requirement for consideration of an extension under § 404(d). However, the number of allowances applied for by all units under § 404(d) exceeded the reserve of allowances available (as limited by the statute) and so a lottery was created to determine who would receive the extension allowances. 40 C.F.R. § 72.42(e)(1)(iii)(C). IPL was unsuccessful in this lottery. However, IPL had joined an Allowance Pooling Group whereby the member utilities had agreed to pool their allowances and distribute them on a prorated basis, based on the number of allowances for which a utility was eligible. IPL Appeal Brief at 7. It thus obtained extension allowances through this pooling arrangement even though it did not win the lottery.[3]

The issue on appeal relates to how the extension allowances were calculated, more particularly the emissions level used in the calculation. The Agency used "the total tonnage of sulfur dioxide emitted in 1988 plus the total tonnage of sulfur dioxide emitted in 1989, divided by 2." 40 C.F.R. § 72.42(c)(3).[4] This calculation was applied

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[2] As defined in CAA § 402(19), 42 U.S.C. § 7651a(19), the term "qualifying phase I technology" means "a technological system of continuous emission reduction which achieves a 90 percent reduction in emissions of sulfur dioxide from the emissions that would have resulted from the use of fuels which were not subject to treatment prior to combustion."

[3] The Agency has not briefed, and so we will not address, any issue relating to the fact that the allowances came to IPL by virtue of this private agreement, and that the amount of the allowance was therefore determined in accordance with rules established under that agreement. (Presumably, the Group could have itself agreed upon an adjustment procedure for its own allocation purposes.)

[4] This provision provides data used to calculate extension allowances pursuant to CAA § 404(d)(5), 42 U.S.C. § 7651c(d)(5), which provides in pertinent part:

> Each eligible Phase I extension unit shall receive allowances determined under subsection (a)(1) or (c) of this section. In addition, for calendar year 1995, the Administrator shall allocate to each eligible Phase I extension unit, from the allowance reserve created pursuant to subsection (a)(2) of this section, allowances equal to the difference between the lesser of the average annual emissions in calendar years 1988 and 1989 or its projected emissions tonnage for calendar year 1995 and the product of the unit's baseline multiplied by an emission rate of 2.50 lbs/mmBtu, divided by 2,000. In calendar year 1996, the

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without any adjustment to account for any outages which occurred during that period. The essence of IPL's concern is that the Petersburg Unit 2 had a six-month outage during this period due to unplanned and unusual repairs. Due to this outage, its aggregate emissions were substantially lower during this two-year period than would typically occur, and thus the number of extension allowances for which it was eligible, based upon the emissions calculated during this period, were similarly lower. In particular, IPL asserts that use of the lower-than-normal emissions levels resulted in a loss of over 26,000 allowances, with a market value of $3 million. IPL Appeal Brief at 7.[5]

IPL asserts that the Region erred in refusing to make an "equitable adjustment" to the 1988-1989 emissions level to correct for this abnormal occurrence when determining an appropriate level of extension allowances. Because the refusal to make an adjustment lowered the number of extension allowances for which IPL would have otherwise been eligible absent the abnormal occurrence, it reduced IPL's share of the allowances received through the pooling arrangement.[6]

> Administrator shall allocate for each eligible unit, from the allowance reserve created pursuant to subsection (a)(2) of this section, allowances equal to the difference between the lesser of the average annual emissions in calendar years 1988 and 1989 or its projected emissions tonnage for calendar year 1996 and the product of the unit's baseline multiplied by an emission rate of 2.50 lbs/mmBtu, divided by 2,000.

[5] The permit indicated the number of extension allowances under 40 C.F.R. § 72.42 for which IPL was eligible. However, because IPL was unsuccessful in the lottery, it was not actually granted any extension allowances in the permit. The permit further stated that "[i]f Phase I extension reserve allowances become available in the future, this application is eligible to receive the allocations specified above by administrative amendment to this permit if the Phase I Extension plan continues to meet the requirements of 40 C.F.R. § 72.42." Statement of Basis, Part B at 3A and 4A.

[6] This argument was articulated more fully in IPL's comments on the draft permit, as follows:

> However, it is important for EPA to understand that the question whether any allowances are *available* to IPL following the outcome of the lottery is different from the question of the precise number of allowances that *would properly be allocable* to the Company in the event they were available. This point is important for the reason that IPL is a signatory to an Extension Allowance Pooling Agreement among utilities that filed extension allowance applications. This Pooling Agreement provides that extension allowances will be allocated among the signatories based upon the number of allowances for which each signatory is *deemed to be eligible* by EPA. Accordingly, IPL stands to be harmed by the

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EPA's Office of General Counsel (OGC) filed a Motion to Dismiss by way of a response to the petition for review.[7] As we will discuss more fully later, OGC asserts that this Board lacks jurisdiction to hear this appeal. OGC contends that IPL is seeking review of a nationally applicable final regulation (*i.e.*, 40 C.F.R. § 72.42(c)(3) quoted in part earlier) and that the Board has no jurisdiction to review such a regulation.[8]

For the reasons discussed below, we conclude that this appeal is of the permit issued to IPL, not of the underlying regulation, and thus we do have jurisdiction to consider it. However, we further conclude that the Region acted in full consonance with the regulation and committed no error in denying IPL an adjustment. Thus, we affirm the permit as issued and deny the appeal.

II. *DISCUSSION*

A. *Jurisdiction*

Appeal procedures for the acid rain program are contained at 40 C.F.R. Part 78, with the scope of the procedures discussed at § 78.1 and § 78.3(d). The fundamental issue in determining whether jurisdiction lies to hear this appeal is ascertaining what is being appealed.

OGC is certainly correct that if a regulation is being appealed, the Board is without jurisdiction. 40 C.F.R. § 78.3(d)(2) precludes administrative review of, *inter alia*, "[a]ny provision or requirement of parts 72, 73, 75, or 77 of this chapter." But as OGC itself concedes, the Board does have jurisdiction under 40 C.F.R. § 78.1 to hear appeals of "the application of the part 72 regulations, in particular adjudicative actions." OGC Appeal Brief at 10. We believe this case involves the latter.

> EPA in the event the Agency refuses to make an adjustment in its determination as to the amount of allowances for which the Company is eligible, without regard to the question whether any such allowances remain available directly from the Agency.

Letter to David Kee, Director, Air and Radiation Division, Region V from Stephen E. Roady, Counsel for IPL, dated September 2, 1994, at 3.

[7] While the Region issued the permit at issue, OGC has represented the Agency on appeal.

[8] IPL filed a brief in opposition to the Motion to Dismiss on March 28, 1995, addressing the jurisdictional argument, and repeating many of the arguments previously made in its Appeal and Petition for Review. The Board has discretion to allow the filing of additional briefs. 40 C.F.R. § 78.20(c). IPL's supplemental brief is hereby accepted.

IPL has styled its appeal as an appeal of the permit itself. While it certainly objects to the absence of any adjustment provision in 40 C.F.R. § 72.42(c)(3),[9] it also argues that the regulations are silent on this issue and thus an adjustment is permissible even under the existing regulations. IPL Appeal Brief at 24. IPL argues alternatively that the Agency "has the authority to deviate from the exact language in the regulation in the appropriate circumstances." *Id.* at 26. Therefore, we construe IPL's appeal as relating to "the application of the part 72 regulations in particular adjudicative actions" and conclude we have jurisdiction to consider it.[10]

B. *The Merits*

That being said, we believe the merits of the appeal *are* essentially dictated by 40 C.F.R. § 72.42(c)(3). We will not entertain any arguments based on the appropriateness of that regulation itself. Such arguments are clearly proscribed by 40 C.F.R. § 78.3(d). Therefore, we will consider only IPL's arguments that an adjustment is not precluded by the regulations because they are silent on the issue, and also that the Agency has the authority to deviate from its own regulations in appropriate circumstances.

IPL's first argument is that since the regulations are silent on the issue of adjustments, the Administrator has the discretion to make such adjustments under those regulations.[11] We find IPL's argument insupportable for the reasons stated below.

It is without question that the Agency, in promulgating 40 C.F.R. § 72.42(c)(3), did not intend to allow for the type of adjustment IPL seeks. The proposed regulation did not provide for any adjustments to the 1988 and 1989 data. In the preamble, the Agency stated that it believed that establishing a procedure to allow for adjustments was "not warranted." It articulated three reasons for this, one of which was

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[9] IPL filed a Petition to Review this provision with the United States Court of Appeals for the District of Columbia Circuit on March 10, 1993. OGC Appeal Brief at 9.

[10] OGC also argues that the appeal is moot because IPL lost the lottery and thus received *no* allowances from the Agency. OGC Appeal Brief at 12. We disagree that the appeal is moot, because the permit condition at issue fixes the level of IPL's entitlement under the permit should any allowances become available in the future for reallocation under 40 C.F.R. § 72.42(e)(3)(iv).

[11] This argument parallels IPL's position that since the statute itself is silent on the issue of adjustments in CAA § 404(d)(5), this leaves the issue to the Administrator's discretion in promulgating implementing regulations. IPL Appeal Brief at 23. As noted before, we will not address this issue to the extent that it constitutes a challenge to the regulation itself, rather than the implementation of the regulation.

that "the information is historical, actual data reported by the utility itself and the statute does not provide for adjustment (Cf. section 403)." Nevertheless, it sought comment on the issue. 56 Fed. Reg. 63,017 (Dec. 3, 1991).

The final regulation mirrored the proposal, with no adjustment procedure added. The issue was not discussed in the preamble to the final regulation. However, it was discussed in a Response to Comments document prepared in conjunction with the final rule. The Agency noted the issue and indicated that it had received various comments on it. In its response to these comments, the Agency stated that it had concluded that such adjustments should not be made "for the reasons stated in the proposed preamble," noting "in particular that the statute does not provide for adjustment of this [sic] data." Response to Public Comment on the Core Rules of the Acid Rain Program, Issue P-8.7.8, at P165-166 (October 1992).[12]

The Agency's position was further articulated in a letter to Senator Lugar from Eileen B. Claussen, Director, Office of Atmospheric Programs, dated November 10, 1992. This letter was sent shortly after the final regulation was signed but before it was published in the *Federal Register*. Ms. Claussen was the head of the office with primary responsibility within the Agency for developing this regulation. The letter read in part:

> Your second issue concerned the adjustment of emissions data for unplanned outages experienced by a unit during the 1988-1989 time period. The final core rules and Section 404(d) of Title IV do not contain any provision for adjusting the 1988-89 emissions data. Section 402(4)(A) explicitly instructs EPA to adjust only the "baseline" for units that experienced continuous outages of more than four months and for accidents that caused prolonged outages. The term "baseline" is defined at Section 402(4)(A) as ". . . the annual average quantity of millions of British Thermal Units (mmBtu's) consumed in fuel during calendar years 1985, 1986, and 1987." Therefore, the years 1988 and 1989 are not part of the "baseline" period and EPA has no legal authority to adjust the 1988-89 emissions data for outages.

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[12] This document does not appear to have been specifically cited in the permit proceedings below. However, it was cited in the OGC Appeal Brief (at 8) and IPL had the opportunity to address it in its supplemental brief, although it did not. We hereby take official notice of it.

The Agency also made its position clear to IPL in its response to IPL's comments on the draft permit. The Agency stated that "it lacks the authority to allow adjustments of the 1988-1989 average annual emissions, regardless of whether such adjustments would be established through a regulation implementing section 404(d) of the Act or on a case-by-case basis in a permit proceeding." Response to Comments at 1. It further stated that "there is no authority to adjust 1988-1989 utilization and thus 1988-1989 emissions for purposes of allocating Phase I extension reserve allowances." *Id.* "In authorizing adjustments of baseline and failing to authorize adjustments of 1988-1989 emissions, Congress barred the Agency from making the latter adjustments on a case-by-case basis in a permit proceeding, as well as on a categorical basis in a rulemaking." *Id.* at 2.

We agree with the Agency's argument that the regulation, while silent on the issue of adjustments, was intended to preclude them. This is shown primarily by the Agency's Response to Comments as previously quoted. We also believe that, while it is not binding upon this Board, Ms. Claussen's letter, which confirmed the Agency's statement in the Response to Comments, is entitled to significant weight, in that it was a contemporaneous statement by a senior Agency manager with primary responsibility for developing this regulation.[13] IPL has provided no support for its argument that the Agency intended its silence on this issue to leave the door open to case-by-case adjustments.

IPL argues alternatively that the Agency "has the authority to deviate from the strict language of the statute and regulation in appropriate circumstances." IPL Appeal Brief at 10. As support, IPL quotes from *Alabama Power Co. v. Costle*, 636 F.2d 323, 357 (1979), as stating that the Agency has:

> "equitable" discretion * * * to afford case-by-case treatment * * * taking into account circumstances peculiar to individual parties in the application of a general rule to particular cases, or *even in appropriate cases to grant dispensation from the rule's operation.* (Emphasis added).

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[13] Contemporaneous statements are often used to help ascertain the intent of a decisionmaker. *See Church of the Lukumi Babalu Aye v. City of Hialeah*, ____ U.S. ____, 113 S.Ct. 2217, 2230-31 (1993) ("Relevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, as well as the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body."). *See also Hagen v. Utah*, ____ U.S. ____, 114 S.Ct. 958, 970 (1994) (contemporaneous statement by President Roosevelt is clear evidence of the intent of certain legislation enacted during his presidency).

IPL then argues that "[g]iven the extension allowance program's purpose of encouraging additional emissions reductions and the significant harm incurred by IPL without an equitable adjustment, this case presents the appropriate circumstance for EPA to exercise its discretion by providing such adjustment." IPL Appeal Brief at 26.

We find IPL's arguments unavailing. As the Agency pointed out in its Response to Comments on the draft permit, the Court in *Alabama Power* also stated that "Congress may, of course, restrain the agency by mandating standards from which no variance is permitted." *Alabama Power, supra*, at 357. Here, after considering whether it had the authority to consider making adjustments for 1988 and 1989, the Agency determined that no adjustments are legally allowed. If the Agency is correct that it does not have the statutory authority to provide adjustments, there is no basis for the Regions to entertain individual requests for such adjustments in a permit proceeding. Whether the Agency should have provided the Regions with that authority is a matter for the Court of Appeals to decide in the context of IPL's challenge to the regulation. Because IPL's argument is inextricably intertwined with the issue of the correctness of the Agency's statutory construction as reflected in the regulation, and we have no jurisdiction to review that regulation, we will not entertain that argument as a basis to disturb the Region's permit decision.

III. *CONCLUSION*

For all the reasons discussed above, the phase I acid rain permit issued to IPL's Petersburg plant is hereby affirmed.

So ordered.