TITLE 327 WATER POLLUTION CONTROL BOARD

LSA Document #05-233(WPCB)

SUMMARY/RESPONSE TO COMMENTS FROM THE SECOND COMMENT PERIOD

The Indiana Department of Environmental Management (IDEM) requested public comment from June 1, 2006, through July 3, 2006, on IDEM's draft rule language. IDEM received comments from the following parties:

Eli Lilly and Company, Inc. (ELC)
Improving Kid's Environment (IKE)
Indiana members of the National Environmental Performance Track Program (NEPT)

Following is a summary of the comments received and IDEM's responses thereto.

General Comments

Comment: IKE agrees that it is good public policy to encourage and recognize activities by public and private regulated entities that go beyond full compliance with all applicable regulatory requirements. There are companies and municipalities in Indiana that practice proactive environmental stewardship and thrive in doing so. Increasing the number of entities that take it upon themselves to maintain 100% compliance and go beyond is good for the health of the citizens of Indiana and our neighbors, is good for our natural resources, and is good for business. IDEM can focus limited resources on companies where they are most needed, and proactive companies can focus their resources on business activities and further environmental stewardship. That works for everyone. IKE appreciates the opportunity to discuss the draft rule and ask questions provided by IDEM at a recent public meeting. The staff provided ample time for all questions to be raised and was forthcoming in their responses. (IKE)

Comment: We are pleased that IDEM has reached out to the Indiana Performance Track membership and all Indiana citizens for input to the proposed Indiana Environmental Stewardship Program (ESP) rule. This clearly demonstrates the commitment of IDEM leadership and staff to embrace a culture of sustainable development through continuous improvement initiatives that can take Indiana beyond mere compliance. This will clearly establish Indiana as a leader in developing creative, substantive solutions to achieve environmental improvement not possible through regulation alone. Voluntary commitments through the ESP will allow the regulated community and all Indiana citizens to identify and select initiatives that will support both environmental improvement and business growth. ESP clearly has the potential to create a competitive business environment and an opportunity to leverage the talent and expertise of IDEM, non-governmental organizations, and Indiana business and industry to achieve our mutual commitment to protection and improvement of the environmental health of our state. We applaud IDEM efforts to develop this program and support this new and timely initiative. We encourage the Board to adopt the new rules as written. (NEPT)

Response: IDEM appreciates the positive feedback on ESP and CLEAN and the agency's involvement of interested stakeholders. The agency also looks forward to this initiative being the starting point for developing partnerships to improve the environment and economic climate in Indiana and encourages those that have been involved to stay involved as the agency looks to optimize these and other programs for the benefit of Hoosiers.

Comment: Indiana companies, cities, and towns that have already demonstrated a strong commitment to environmental stewardship should be recognized and provided flexibility where appropriate by IDEM. However, IKE is worried about entities eager for the incentives and

willing to commit to the requirements of the program without any assurance, based on past behavior, that they will comply with them over the long term. IDEM's proposed program would allow entities into the program based upon a commitment for future action, not a demonstrated history of commitment to environmental stewardship. Requiring some demonstration of willingness to go beyond compliance before accepting an entity into the program will not dissuade entities from seeking the benefits of the program.

An applicant must have developed and implemented an EMS and must commit to implement a specified number of "continuous environmental improvement initiatives" after acceptance into the program. However, there is no requirement that a company demonstrate proper implementation of the EMS over time or for a company to have demonstrated any commitment to environmental proactivity prior to applying for acceptance into the program. (These are two instances where the proposed state program differs from the National Performance Track Program. In each case, the proposed state program would be less rigorous than the federal counterpart.) IKE agrees with comments made by IDEM staff that the projects undertaken by companies must be appropriate in scope and sophistication to the size and type of company undertaking them. It is also very important that the public, especially members of the community, have an opportunity to understand and provide input on the projects being proposed by applicants and considered by IDEM.

IKE believes that adoption and demonstrated implementation of an Environmental Management System, a strong compliance history, and demonstrated commitment to environmental proactivity are essential eligibility requirements. A program like this must be rigorous. The public relies on IDEM to ensure that regulated entities with pollution discharges either comply with all requirements or are compelled to do so through compliance and enforcement activities. A program that offers less regulatory attention to companies that may be responsible for significant amounts of toxic pollutants and subject to dozens of complex technical and legal requirements must be rigorous to assure the public that its health and welfare are fully protected. That means that eligibility criteria should be high. In order to benefit from the recognition, special treatment, and increased flexibility offered, a company or municipality should truly be a demonstrated leader in environmental stewardship. (IKE)

Response: Both ESP and CLEAN are environmental leadership programs. It is IDEM's position that those entities that have implemented an EMS and made a commitment to continuous environmental improvement through these programs have demonstrated environmental stewardship. Taking these steps is being environmentally proactive. The federal program (NEPT) has not successfully recruited small and medium-sized entities, largely due to the required "track record" of demonstrated performance. IDEM desires to convince Indiana entities, especially small and medium-sized businesses, that there is now incentive to take that next step in the evolution of managing their environmental responsibilities from basic compliance with the regulations to proactive environmental management and continuous improvement. For those willing to take this proactive step, joining such programs is a business decision. There must be value in joining such programs, available within a reasonable amount of time of making that decision. Both the EMS and environmental improvement initiatives must be approved and will be subject to annual evaluation by IDEM. This provides that desired level of assurance. While the public will have access to reviewing members' applications and annual reports, providing the opportunity to understand members' projects, IDEM does not intend to accept public comment pertaining to the approval of members' projects at this time.

Comment: After careful review of both the Second Notice of Rulemaking and the "Recognition and Regulatory Flexibility Incentive Guidance" (dated June 9, 2006), and for the reasons discussed in other comments, IKE has serious concerns about the eligibility and incentive aspects of the draft program. We are also concerned that adoption of this program, if

and to the extent it does not comply with EPA's expectations for Indiana's delegated programs, will jeopardize that delegation. We presume that you have asked U.S. EPA Region V to review the draft rule for their comments. We will also be seeking U.S. EPA's reaction to the proposed program. (IKE)

Response: In an effort to develop leadership programs with stewardship caliber membership and address such concerns shared with IDEM during the public meetings, ESP and CLEAN eligibility criteria exceed U.S. EPA's NEPT eligibility criteria in the regulatory compliance component, ability for program area staff to provide comment and public access to membership information, and the public's ability to provide information to IDEM during membership determinations. Incentives were carefully developed with input from all applicable IDEM program areas and numerous stakeholders during the public meetings over the past year. IDEM is comfortable with the listed incentives, striking a fair balance between the agency, regulated community, and interested stakeholders. None of the incentives is less stringent than the applicable federal regulations. Discussions with EPA Region V continue with the intent to develop the necessary agreements to provide a good working relationship between IDEM and EPA, promoting both IDEM's leadership programs and NEPT. Previously developed agreements will need to be revised to reflect these programs. U.S. EPA headquarters has been working closely with the Office of Pollution Prevention and Technical Assistance (OPPTA) to develop ESP and CLEAN and is anxious for IDEM to implement these programs. EPA headquarters staff has offered and plans to assist IDEM in discussions with EPA Region V to develop these agreements.

Comment: IKE is concerned about the agency resources that will be required to implement this program, especially if it attracts substantial interest. Making initial eligibility decisions, providing assistance to companies, and monitoring compliance with the terms of the designation will be time consuming. Does IDEM expect to divert human resources now focused on compliance and enforcement activities to this program? (IKE)

Response: IDEM believes most Hoosiers are anxious to realize the benefits of a program that will produce positive results for the environment beyond those achieved through routine agency compliance and enforcement efforts. It is difficult to determine the amount of resources that will be needed to begin these programs as membership demand can only be estimated. However, IDEM anticipates needing compliance and enforcement resources during the early stages of these programs to assist OPPTA with membership determinations. As more entities are entered into the programs, IDEM anticipates a resource neutral period as the agency begins to spend less time with oversight of program members. In subsequent years, IDEM anticipates resource savings as a result of these programs, focusing agency resources on those sources that require increased oversight and Indiana sources the agency today knows little or nothing about. OPPTA anticipates having adequate resources to manage these programs. IDEM program area staff will always play a role in these programs as IDEM works to identify sources that are ideal candidates for membership, to maximize the value of the programs through existing and future benefits for members, and to reallocate agency resources resulting from time savings realized by the agency through these programs.

Comment: There appears to be no notice to the public of proposed or final acceptance of an entity into the program or revocation of ESP or CLEAN status. The opportunity for public input and notice to the public are important because members of the community may have information relevant to the agency's decision and are entitled to know whether a company in their town is participating. IDEM should include procedures for notifying the public of proposed and final acceptance as well as revocation, and those notice mechanisms should be spelled out in the rule. These procedures should have regularly scheduled times (perhaps quarterly) for

proposed acceptance of applicants. It is fair to expect interested parties to check the IDEM web site on a reasonable, regularly scheduled basis but not on a daily or unpredictable basis. (IKE)

Response: Membership activity is planned to be posted on the IDEM web site. Currently, there are two membership application periods per year scheduled. This will provide a regular schedule in which all interested parties may review entities applying to the program, existing members, and memberships that have been revoked. IDEM agrees with IKE's comment that this should be clearly spelled out in the rule. Requirements in this rule pertaining to revocation have been revised to reflect web posting of membership revocation.

Comment: The discussion in the Second Notice states that IDEM will start accepting entities into the program providing the incentives that are not dependent on rule revisions. When will the agency start considering applications? (IKE)

Response: IDEM plans to begin accepting applications on September 1st. This application period is in line with EPA's next NEPT membership round.

Comment: IKE suggests that the rules specify appeal rights by applicants and other parties, procedures and timing for appeal of both acceptance into the program and removal from it, and any other decisions that may be made by the commissioner. (IKE)

Response: IDEM has carefully considered this issue, and, considering these programs are voluntary in nature, appeals will not be granted. This conclusion is based on IC 4-21.5-2-5(17).

Comment: At its recent public meeting, IDEM mentioned that companies could use projects funded, or partially funded, through state assistance or incentive programs as their initiatives for this program. IKE appreciates that IDEM wants to boost interest in these types of programs, some of which are underused, but would like more detail from IDEM on how state-assisted initiatives would be evaluated. For example, with programs where state funding or other assistance is on a first-come, first-served basis, some companies may be at a disadvantage. In some cases, those incentive programs are administered by IDEM, which may then be in the position of deciding whether to grant funding assistance to a particular project which the applicant is counting on for approval in another IDEM discretionary program. This could get complicated. (IKE)

Response: While IDEM agrees this could get complicated, it is a good problem to have. A time when voluntary programs doing good things for the environment are at full utilization and the agency has the ability to select only the best projects to get funding assistance means these programs are providing the highest possible value to Hoosiers.

Comment: IKE hopes this program is successful and that companies and municipalities throughout the state come to view environmental regulations as a given and a starting place for environmental stewardship and responsibility. To assure the public, U.S. EPA, and the regulated community that this is in fact the case, IKE requests that IDEM commit to prepare an annual report on the ESP and CLEAN programs, including the following information (which IDEM would readily have) for the year:

1. The entities approved into the program, renewals, and revocations (including the reason for revocation).
2. A list and summary of the continuous improvement initiatives that have been completed during the year and their environmental benefit.
3. Any noncompliance identified for any entity participating in the program and what action was taken by IDEM.

(IKE)

Response: IDEM agrees and believes an annual report or summary is necessary to keep members on track with their commitments and to communicate the environmental benefits realized through these programs. Items 1 and 2 are planned for inclusion in this report. Item 3 will be reported in other existing agency compliance related public records.

ESP and CLEAN Programs

Comment: The definition of "entity" in 327 IAC 18-1-2(4), does not reflect the variety of business arrangements a company may have at a single geographical location, and thus may unintentionally exclude a site from participating in the ESP. The word entity is used to define the geographical and business characteristics of a company or facility that is eligible to participate in the ESP. As proposed, the term limits the scope of eligible entities to geographically connected sites operating under a single environmental management system (EMS). This approach would prohibit a complex manufacturing site that has many business units and environmental management systems from participating in the program. For example, Lilly's facilities in Indiana have more than one (1) business unit at a geographical location. Each business unit may be responsible for manufacturing a different type of product or are involved in different stages of pharmaceutical production. These multi-business sites may share common utilities, waste treatment, and other non-production operations. Those business units, however, may have individually tailored EMS, and, in some cases, the management hierarchy at the site does not pass through a single site manager.

Lilly suggests that even if a single geographic site includes more than one (1) business unit and more than one (1) EMS, the entire site should still be considered an "entity" that is eligible for participation in the ESP. This approach is consistent with IDEM's goals for the ESP program, and it is consistent with U.S. EPA's NEPT program. Accordingly, Lilly recommends that IDEM either delete the proposed language in 327 IAC 18-1-2(4)(A) as shown below:

> (4) "Entity" means a company, corporation, firm, enterprise, authority, institution, partnership, or unit of local government, or part or combination thereof, whether incorporated or not, public or private, that has its own functions and administration. Except as described in section 4(c) of this rule, an entity is one (1) geographic location under~~:~~
>
> ~~(A) a single EMS; and~~
>
> ~~(B)~~ the direction of senior management.

Alternatively, the definition of "entity" could be amended as follows:

> (4) "Entity" means a company, corporation, firm, enterprise, authority, institution, partnership, or unit of local government, or part or combination thereof, whether incorporated or not, public or private, that has its own functions and administration. Except as described in section 4(c) of this rule, an entity is one (1) geographic location under:
>
> (A) ~~a single~~ **one or more** EMS; and
>
> (B) the direction of senior management.

(ELC)

Response: IDEM is aware of the complexity of business ownership scenarios that exist and did not intend to exclude entities or relationships as described in this comment. The rule language has been revised to indicate an "entity" is a geographic location with "at least one EMS" to allow for the situation described.

Comment: In 327 IAC 18-1-2, the definition of "Environmental Stewardship Program" applies to "entities" that meet the specified criteria. "Entities" include both companies and municipalities. Are municipalities eligible for the ESP program or just CLEAN? (IKE)

Response: Municipalities are eligible for ESP and CLEAN, however, IDEM would encourage a municipality to join CLEAN in an effort to include other parts of local government and the community in the municipality's Quality of Life Plan (QLP) and provide benefits offered through CLEAN to that community.

Comment: The definition of "senior management," in 327 IAC 18-1-2(14), does not reflect the variety of business arrangements a company may have at a single geographical location and, thus, may unintentionally exclude a site from participating in the ESP. The definition of "senior management" appears to be limited to sites under the responsibility of an individual senior manager with executive responsibility for the site or a group of managers acting together with executive responsibility for the site. Lilly believes that defining the term in this manner does not reflect the diversity of business organizations that may exist at a site. This definition should be amended to reflect the fact that there could be more than one senior manager at a site, each with executive responsibility over a particular area at the site, and none with responsibility for the overall site. Accordingly, Lilly offers the following amendment to the proposed definition of "Senior management" found at 327 IAC 18-1-2(14)(A).

(14) "Senior management" means the following:

(A) For entities, the person**, persons,** or group **of persons** with executive responsibility for the entity.

In order to close the loop of issues affected by these definitions, Lilly also recommends amending the proposed language in 327 IAC 18-1-4(c) as follows:

(c) A membership for an entity shall be limited to cover one (1) geographic location ~~under a single EMS~~.

(ELC)

Response: IDEM's intent is to ensure there is commitment by senior management at the entity to membership and the requirements of these programs and did not intend to exclude management relationships as described in this comment. The rule language has been revised to clarify that one or more individuals may have senior management responsibility.

Comment: IDEM should define more specifically what "substantial environmental compliance" means, and written criteria should guide the agency's decisions. "Substantial" implies that some amount of noncompliance would be acceptable, but provides a lot of room for discretion, although the specifics provided in 327 IAC 18-1-10(c) and (d) appear to give detail to the more general term. IKE suggests that IDEM include a definition of the term "substantial environmental compliance" and, also, that 327 IAC 18-1-10(d) include the following language:

"(8) Any other information the commissioner deems relevant."

Based on comments at the public meeting, it appears that IDEM is willing to consider on a case by case basis most compliance situations before deciding that an applicant is not eligible for the program. IKE agrees with the provisions in the current draft rules that certain past activities should eliminate an applicant from consideration and would offer another for inclusion: ongoing noncompliance with a Consent Decree or Agreed Order. (IKE)

Response: IDEM desires to promote and provide clear and consistent compliance determinations. Further defining substantial environmental compliance would not eliminate the need for case by case review. 327 IAC 18-1-4(d)(6)(B) does provide an opportunity for relevant information to be presented and reviewed by the commissioner during membership determination and in other applicable membership renewal sections.

Comment: In 327 IAC 18-1-4, concerning membership application, subsection (b) states that the senior management signature on the application subjects him or her to liability under

state laws forbidding false or misleading statements. It is not clear which laws are referred to here and whether it would be civil or criminal liability. Subsection (d) states that a representative of the agency must make a site visit but is not specific about what that site visit entails. IKE urges IDEM to provide more guidance and make clear to prospective applicants and the public what to expect from the site visit. (IKE)

Response: Indiana law provides for criminal liability for knowing and intentional violations. See, e.g., IC 13-30-6-2 and IC 13-30-6-3. Criminal prosecutorial authority rests with county prosecutors who may elect to accept or reject the referral of a case for criminal prosecution. In cases where the county prosecutor does not accept a referral for criminal prosecution, it is likely that an administrative or civil enforcement action may be taken by IDEM against the alleged violator. See, Section 4.1 (Actions Before the Violation) of IDEM's Civil Penalty Policy. Site visits will be further explained in relevant sections of the membership application materials.

Comment: Will an entity's status with respect to any other statutory or regulatory program be considered for eligibility (for example, compliance with tax obligations, labor laws)? IKE hopes so, and suggests that reference be made in the rule to these other checks so that applicants will be aware of them. (IKE)

Response: IDEM has carefully considered this issue. Considering these are environmental programs, IDEM will make compliance type requests with other relevant state agencies; however, IDEM does not intend to prohibit membership based on findings. IDEM does intend to advise potential members to reconcile issues with other Indiana state agencies if applicable.

Comment: IKE notes that municipalities appear to have to implement more improvement projects than industries (five compared to three over the same three year period). What is the reason for this discrepancy? If the expectation is that businesses will implement fewer, but more substantial, projects, this expectation should be spelled out in the rule. (IKE)

Response: IKE is correct in that many anticipated projects in CLEAN will be less substantial than those approved in ESP. Project lists in both programs are not ideal for inclusion in rule because they are categorical in nature, quite extensive, and anticipated to be revised periodically to account for technological advancements and to encourage members to voluntarily address Indiana's environmental challenges and agency priorities.

Comment: In 327 IAC 18-1-8 concerning revocation, do the procedures in subsection (c) apply to both subsections (a) and (b)? Subsection (a) lays out situations where the commissioner "shall" revoke membership, but the procedures in subsection (c) appear to apply when the decision to revoke is discretionary. It is not suggested that the process is not appropriate under a mandatory revocation scenario, but that IDEM should look at the language carefully to make sure the process established here does not preclude or interfere with the commissioner's obligation to revoke membership under circumstances described in subsection (a). (IKE)

Response: It is IDEM's intent to provide notification to program members prior to membership revocation. 327 IAC 18-1-8(c) has been revised to clarify this.

Comment: In 327 IAC 18-1-9, concerning transfers, the draft rule properly states that membership cannot be transferred to another entity. What about if a company changes ownership? Will membership automatically be retained by the new owners? Will IDEM require notification of the change? (IKE)

Response: After further consideration, transferring membership will be allowed provided the new ownership signs a new membership agreement, committing the entity to following

through with the previous owner's commitments, maintaining the facility's membership in good standing. The rule language in 327 IAC 18-1-9 has been revised accordingly.

Comment: In 327 IAC 18-1-10, concerning standards of environmental compliance, subsection (a) states that a member of senior management must certify "to the best of their knowledge" that the entity is currently in compliance with all applicable requirements. This is a very weak standard requiring minimal diligence on the signatory's part and much weaker than is required in other regulatory programs. Senior management should be held to a higher standard, especially if they are applying for admission to an elite program. Submission of a Title V Air Operating Permit application and compliance certification documents under that permit, for example, must be accompanied by a certification by a responsible official stating that, "based on information and belief after reasonable inquiry, the statements and information in the document are true, accurate and complete." (326 IAC 2-7(4)(g)) This would be a more appropriate expectation. (IKE)

Comment: Lilly believes the proposed requirement in 327 IAC 18-1-10(a) that a member of senior management certify that the entity is currently in compliance with all local, state, and federal environmental laws and regulations could stifle participation in the ESP. Although Lilly agrees that members of the ESP should have superior environmental compliance performance records, we believe that it may be impossible for all prospective members to certify that at the time of application the entity is "in compliance with all local, state, and federal environmental laws and regulations."

IDEM has recognized that the ESP should not be an exclusive club for entities that are able to achieve 100% compliance all the time. Consequently, the agency has proposed language in 327 IAC 18-1-10(d) that would enable an entity that is currently not 100% in compliance to participate in the ESP. The certification requirement proposed in 327 IAC 18-1-10, however, contradicts this position, and could limit participation in the ESP only to those who currently have minor, but unresolved compliance issues. Lilly recommends that IDEM consider changing the certification to reflect this potential conflict.

In addition, although it appears the proposed rule language is based on similar language in the NEPT application, there is at least one significant difference. The NEPT certification includes the qualifying language "based on reasonable inquiry." These additional words provide the person signing the certification with an appropriate degree of certainty, without requiring 100% knowledge, about the current compliance status of the facility. This concept is used under the Title V and Federally Enforceable State Operating Permit (FESOP) permitting programs so many industrial facilities will be familiar with the concept. Lilly recommends adding similar language to the proposed Indiana rules.

Finally, the certification should include some wording that limits the scope of the certification from all environmental regulations to only the regulations that are applicable to the source. Again, the certification in the NEPT application provides this clarification. Accordingly, Lilly suggests the following amendments to the proposed language in 327 IAC 18-1-10:

> (a) To be accepted into ESP or CLEAN, a member of senior management of the entity shall submit a certification with the application to the department certifying that to the best of their knowledge **and based on a reasonable inquiry**, the entity is currently in compliance with ~~all~~ **applicable** local, state, and federal environmental laws and regulations.

(ELC)

Response: IDEM is in agreement with these comments and has revised the rule language accordingly.

Comment: In 327 IAC 18-1-11, concerning environmental management systems, IKE believes that an entity applying for membership in ESP or CLEAN should have had an EMS in place for some length of time, at least six months, prior to applying to the program to demonstrate the company is in fact implementing it correctly. Commitment to and implementation of a viable EMS takes ongoing effort on behalf of a company; we agree with U.S. EPA's Performance Track Program that some demonstration of a successful track record is warranted. (IKE)

Response: As stated in a previous response, IDEM desires to encourage Indiana regulated entities to make the decision to take the next step to proactive environmental management, becoming eligible for these programs. EPA's Performance Track Program has been unsuccessful in appealing to small and medium-sized companies. A reason for this is the incentive to develop and implement an EMS and commit to continuous environmental improvement and business value realized through these incentives in EPA's Performance Track Program cannot be factored into the business decision to make this commitment because it is too far into the future to factor into that decision. IDEM desires to appeal to those entities that, today, do not have an EMS. There is much to gain by all Hoosiers if Indiana regulated entities are more proactive in managing their environmental responsibilities and committing to continuous environmental improvement. It is a significant accomplishment to develop and implement an EMS. Once an entity does this and commits to the remaining requirements of these programs, IDEM feels such entities are worthy of being called environmental stewards and receiving program member status.

Comment: In 327 IAC 18-1-12, concerning continuous environmental improvement, the rule implies but does not specify that the improvement projects must be completed (or substantially implemented if the project is not one that can be completed within a three year period) within the three year term of the approval. IKE urges IDEM to make this clear in the rule. (IKE)

Response: IDEM believes the current rule language in both the continuous environmental improvement section (327 IAC 18-1-12) and annual summary for ESP members section (327 IAC 18-1-13) adequately addresses this.

Incentives

Comment: IKE does not object to providing incentives, through recognition and more personal service, to companies who go beyond minimum requirements. IKE supports recognition of companies and municipalities that are true environmental leaders. Public recognition in a variety of ways, networking opportunities, and efforts to streamline and improve permit service and other agency functions are appropriate ways to acknowledge the extra effort that has been made by an environmental leader. It is equally important to the public and to other entities in the program, however, that recognition be withdrawn promptly if an entity drops out of the program (whether voluntarily or because it no longer meets the requirements for eligibility). IKE urges IDEM to make sure that procedures are in place to acknowledge such changes in status. (IKE)

Response: IDEM agrees with this comment and has revised the rule accordingly. The agency has also begun the process of developing procedures for handling this situation.

Comment: IKE is very concerned with the proposal's incentives regarding routine inspections. Within the parameters of each regulatory program and federal guidance where applicable, IDEM has discretion to direct more or less attention to individual sources. Even without an ESP or CLEAN program, IDEM inspectors and managers can and do make judgments about whether and when sources require inspections, based on considerations such as

compliance history. A company that has demonstrated full compliance inspection after inspection just will not command the kind of attention that a company with a less stellar track record will—nor should it. IKE is concerned, however, with a program that promises lowered routine inspection frequency for any regulated source. For many sources in Indiana, inspections are an infrequent event already (every two or even five years for some types of sources). (IKE)

Response: Reducing routine inspection frequency for members of such programs is consistent with NEPT and other state programs. Other comments indicate concern relative to limited agency resources. Reducing oversight of entities proven and committed to environmental stewardship allows the agency to focus these limited resources towards those sources in need of increased attention and resources to work on solutions to Indiana's environmental challenges. In an effort to be clear and consistent, IDEM has made every effort to include as much of this program in rule as feasible. Using agency discretion as the sole mechanism for inspection frequency in these programs will lead to inconsistent application of this incentive. Agency procedures are also being developed to provide clear and consistent application of this and other incentives.

Comment: The plan to provide advance notice to ESP and CLEAN entities of an inspection is very disturbing. Unannounced inspections are a critical element of any compliance program. They allow inspectors to assess compliance when the regulated entity does not expect to have visitors. When inspections are preannounced, furthermore, it is not uncommon for particular operations to be undergoing maintenance and therefore not available for inspection. It is not that the agency is hoping to surprise companies and catch them in noncompliance. At the public meeting, IDEM suggested that the impetus for offering this incentive comes from occasions when IDEM inspectors have arrived for regular, unannounced, inspections, and found the company's environmental manager not present. Regulated entities must be in compliance at all times, whether or not the environmental manager is present and should be prepared for an inspection at any time, especially ones that seek to be recognized as environmental leaders. An unannounced inspection is not a punishment; rather, it is an opportunity to demonstrate to the agency and the community that it truly is in full compliance. Businesses that employ an environmental manager understandably prefer to have that staff available when the IDEM inspector arrives. It makes for a more complete inspection and is less disruptive to regular business operations. IKE encourages the agency to consider other ways to address this concern, without institutionalizing the concept of announced inspections for entities in the ESP and CLEAN programs. (IKE)

Response: IDEM has carefully considered this incentive. An alternative currently being discussed by EPA through its Performance Track Program is to allow members to schedule inspections at certain times of the year in lieu of inspection incentives like announcements. IDEM believes that approach could lead to even more instances where certain equipment or processes may not be in operation during the inspection. IDEM's preannouncement only provides a 24 hour notification, not enough time to correct any significant compliance issues yet an opportunity to ensure appropriate staff or representation is present during the inspection and ensures efficient use of limited agency resources.

Comment: IKE notes that the draft rule language states that FESOPs and minor state operating permits may be renewed for a period up to ten years, if approved by the commissioner. IKE does not believe that any permit should go for as long as ten years without review. Changes in regulatory requirements and operations are bound to occur over that long a period of time. A streamlined renewal process may be appropriate where there have been no or insignificant changes in an entity's operations or regulatory requirements, however. IDEM's guidance uses

the word “will” instead of “may.” This is a subtle but important difference. When does the agency mean? (IKE)

Response: Currently, many of these existing permits have been extended several years beyond the 5-year permit term. In an effort to increase overall agency efficiency, IDEM desires to issue these permits as 10-year permits for program members as appropriate and allowed by federal rule. All incentives may be refused by members, such as the agency issuing a 10-year FESOP or Minor State Operating Permit (MSOP).

Comment: At the recent public meeting, IDEM mentioned another possible incentive to companies participating in the ESP program—increased access to agency personnel to discuss rules under development. This is completely inappropriate and would be extremely detrimental to the integrity of the public rulemaking process. All parties should theoretically have equal access to put their views before the agency on rules under development. As a practical matter, businesses already have greater access to the agency than members of the public because of their day to day regulatory relationship (through permitting, inspections, compliance assistance activities) and generally are better equipped in terms of resources (both time and expertise) than the public.

Few things will erode the credibility of an incentive-based program to encourage environmental stewardship more than those that change the fundamental relationship between the agency and the regulated community (e.g. preannounced inspections) or that give the impression to the public, real or perceived, that companies will have even greater access and influence in agency decision making on issues of policy (e.g. rule development). (IKE)

Response: IDEM desires to increase participation by all interested stakeholders in the rulemaking process. In the spirit of these programs being a partnership with IDEM, the agency hopes to utilize these relationships to promote discussion of rulemaking and other agency initiatives.

Comment: The draft rule at 327 IAC 18-2-2 allows an automatic and drastic reduction from monthly to annual submission of discharge monitoring reports, and 327 IAC 18-2-3 allows the total deletion of the requirement to submit monthly reports of operation. This reduction of reporting requirements is of great concern especially regarding large municipalities and industries that discharge or have the potential to discharge very large amounts of wastewater. The monthly reporting obligation is a way to ensure that dischargers are paying very good attention to their treatment functions in an ongoing manner. Monthly reporting also provides regular information to the public. With annual reporting, it could be a year before a problem is identified. Furthermore, for companies and municipalities implementing an EMS, regular reporting should be easier and more efficient. Rather than automatic reduction or elimination of these reports, the rule should offer these lessened reporting requirements as incentives for smaller municipalities or companies with extremely good compliance records. Other ideas for incentives to substitute for reduction or elimination of reporting could include the following:

Allowing an entity the opportunity to be first with electronic reporting as IDEM implements it.

Allowing an entity the opportunity to use an entity-specific form that suits the entity’s needs and provides the needed information to IDEM and the public.

(IKE)

Response: IDEM has carefully considered this incentive, how other states have implemented the federal DMR requirement in this same way in their performance leadership programs and those states that adopted the federal rule as written, which requires only the annual DMR as IDEM proposes for ESP and CLEAN members. The DMR was intended by EPA to be an annual summary of operations. It was never intended to become a monthly reporting

requirement or means for facilities to calculate their monthly averages or determine their compliance status. Permit conditions outline each facility's requirements or sampling, analysis and compliance determination with permit limits. For facilities that maintain compliance with their permit conditions, DMRs, MMRs, and MROs become little more than affirmative compliance reports and a redundant affirmation of compliance with permit conditions. Should there be an instance of noncompliance, permit conditions will continue to require separate IDEM notification as permits have always required. DMRs, MMRs, and MROs are not the method in which a facility notifies IDEM of noncompliance issues. Sampling results and calculations needed to determine compliance will still be required to be maintained and made available upon request. Should there be an instance of noncompliance, the public will still have access to that information. IDEM has not experienced public interest in documentation from facilities indicating affirmative compliance with permit conditions such as would be indicated in monthly DMRs, MMRs, and MROs from ESP and CLEAN program members. An annual DMR will serve this purpose. Should this incentive prove to become a problem for members in determining and maintaining their compliance status, IDEM reserves the right to revoke this incentive from that particular member.