TITLE 326 AIR POLLUTION CONTROL BOARD

Proposed Rule
LSA Document #05-232

DIGEST

Adds 326 IAC 25 concerning voluntary performance based leadership programs. Effective 30 days after filing with the Publisher.

HISTORY

First Notice of Comment Period: September 1, 2005, Indiana Register (28 IR 3665).
Continuation of First Notice: April 1, 2006, Indiana Register (29 IR 2373).
Second Notice: June 1, 2006, Indiana Register (29 IR 3109).
Notice of First Hearing: June 1, 2006, Indiana Register (29 IR 3121).
Change of Hearing Notice: September 6, 2006, Indiana Register (20060906-IR-326050232CHA).
Date of First Hearing: October 19, 2006.

PUBLIC COMMENTS UNDER IC 13-14-9-4.5

IC 13-14-9-4.5 states that a board may not adopt a rule under IC 13-14-9 that is substantively different from the draft rule published under IC 13-14-9-4 until the board has conducted a third comment period that is at least 21 days long.

REQUEST FOR PUBLIC COMMENTS

This proposed (preliminarily adopted) rule is substantively different from the draft rule published on June 1, 2006, at 29 IR 3109. The Indiana Department of Environmental Management (IDEM) is requesting comment on the entire proposed (preliminarily adopted) rule.

The proposed rule contains numerous changes from the draft rule that make the proposed rule so substantively different from the draft rule that public comment on the entire proposed rule is advisable. This notice requests the submission of comments on the entire proposed rule, including suggestions for specific amendments. These comments and the department's responses thereto will be presented to the board for its consideration at final adoption under IC 13-14-9-6. Mailed comments should be addressed to:

#05-232 ESP/CLEAN
Christine Pedersen Mail Code 61-50
c/o Administrative Assistant
Rule Development Section
Office of Air Quality
Indiana Department of Environmental Management
100 North Senate Avenue
Indianapolis, Indiana 46204-2551.

Hand delivered comments will be accepted by the receptionist on duty at the Office of Air Quality, Tenth Floor East, 100 North Senate Avenue, Indianapolis, Indiana. Comments may also be submitted by facsimile to (317) 233-2342, Monday through Friday, between 8:15 a.m. and 4:45 p.m. Please confirm the timely receipt of faxed comments by calling the Rule Development Section at (317) 233-0426.

COMMENT PERIOD DEADLINE

Comments must be postmarked, faxed, or hand delivered by January 17, 2007.

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)
United States Environmental Protection Agency (USEPA)

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 were 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 an 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 U.S. 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 are less stringent than the applicable federal regulations. Discussions with U.S. EPA Region V continue with the intent to develop the necessary agreements to provide a good working relationship between IDEM and U.S. 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. U.S. EPA headquarters staff has offered and plans to assist IDEM in discussions with U.S. 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 resource 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 website 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 website. 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 U.S. 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 where 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 326 IAC 25-1-2(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 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 business unit and more than one 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 delete the proposed language in 326 IAC 25-1-2(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 326 IAC 25-1-2, 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 326 IAC 25-1-2(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 326 IAC 25-1-2(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 326 IAC 25-1-4(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 326 IAC 25-1-10(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 326 IAC 25-1-10(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. 326 IAC 25-1-4(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 326 IAC 25-1-4, 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 the 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 326 IAC 25-1-8, 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. 326 IAC 25-1-8(c) has been revised to clarify this.

Comment: In 326 IAC 25-1-9, 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 326 IAC 25-1-9 has been revised accordingly.

Comment: In 326 IAC 25-1-10, 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 326 IAC 25-1-10(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 326 IAC 25-1-10(d) that would enable an entity that is currently not 100% in compliance to participate in the ESP. The certification requirement proposed in 326 IAC 25-1-10, 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 326 IAC 25-1-10:

> (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 326 IAC 25-1-11, 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: 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. U.S. 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 U.S. 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 326 IAC 25-1-12, 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 (326 IAC 25-1-12) and the annual summary for ESP members section (326 IAC 25-1-13) adequately address 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 U.S. 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 up to 10-year permits for program members as appropriate and allowed by federal rule. Specific incentives may be refused by a member, 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: Section 326 IAC 25-2-3 allows monthly compliance for volatile organic compounds (VOC) as an incentive under Indiana's draft Environmental Stewardship Program rulemaking. However, this incentive is inconsistent with U.S. EPA's prohibition against the use of greater than daily averaging, except in accordance with established U.S. EPA policy. It should be noted that monthly averaging provides more than just easier recordkeeping. The chief reason for this policy is that monthly averaging is a relaxation in that it allows coatings or inks to exceed their applicable VOC emission limits if these increases are offset by coatings or inks that are below the applicable limits. (USEPA)

Comment: IKE does not agree that monthly averages are appropriate to demonstrate compliance with VOC requirements. Ozone is a daily pollutant–monthly averages are irrelevant to a daily standard that is highly dependent upon specific weather conditions. How will a company with emission limits expressed as daily limits be able to demonstrate compliance using monthly averages? (IKE)

Response: IDEM does not believe this incentive provides reasonable opportunity to violate VOC emission limits in normal operations. The same concern relative to the averaging of noncompliant coatings with compliant coatings applies on a daily basis as well. The U.S. EPA prohibition referenced is not in any applicable federal regulations, therefore, not enforceable. IDEM has had discussions with U.S. EPA on this particular incentive and based on these discussions, believes an agreement will be reached.

SUMMARY/RESPONSE TO COMMENTS RECEIVED AT THE FIRST PUBLIC HEARING

On October 19, 2006, the Air Pollution Control Board (board) conducted the first public hearing/board meeting concerning the development of new rules at 326 IAC 25. Comments were made by the following parties:

Improving Kid's Environment (IKE)

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

Comment: These kinds of programs are really important. It's very important for companies to understand that

there are good reasons to go beyond compliance, and it's important for agencies like IDEM to provide opportunities for companies to do that, so I'm supportive of the concept of this program very much.

I also wanted to express my appreciation for how open IDEM has been in the rulemaking process to invite people in. They've been taking a lot of time to talk to people about the program and explain their reasoning for things, and that's very much appreciated, and I know that several of my own comments led to changes in the draft rule, and I appreciate that as well. (IKE)

Response: IDEM appreciates the positive feedback on ESP and CLEAN and IDEM's involvement of interested stakeholders. IDEM 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 IDEM looks to optimize these and other programs for the benefit of Hoosiers.

Comment: The most important thing for a program like this is to maintain its credibility and for everyone to feel assured that the companies in this program truly are going beyond compliance and that environmental standards are not being relaxed in any way for those companies. (IKE)

Response: IDEM agrees and believes the program has been developed in a manner that will establish and maintain the credibility of the program. The requirements of the program in this rule will provide the assurance that member companies are going beyond compliance and that environmental standards are not being relaxed.

Comment: Resources are going to be really important. We won't know until the deadline how many companies are interested in this and how much resources it will take, but it's important for IDEM to devote the appropriate amount of resources to reviewing the applications and to keeping track of how the companies perform if they're given the privilege of being in this program. IDEM should be sure resources are available to manage the program properly. (IKE)

Response: IDEM's Office of Pollution Prevention and Technical Assistance (OPPTA) has been preparing to support this program since the First Notice of Rulemaking, over a year ago, by providing EMS and program specific training to additional OPPTA staff, outside the P2 program, should the need arise to provide additional resources. OPPTA received a grant from U.S. EPA to implement ESP and provide contractor assistance if needed. ESP will provide efficiency improvements for both IDEM and members of the program. States with similar programs have increased overall agency efficiency as a result of these programs. IDEM's program has been designed to maximize agency efficiency and provide real business value to members.

Comment: The rule includes an annual report that each company needs to submit. IDEM should also issue an annual report that summarizes the success of the program so that the information is available in one place for the public to view. This will make it easy for the public to see that this program is being successful and that these companies really are going beyond compliance and that there are not problems with it. (IKE)

Response: IDEM's Office of Pollution Prevention and Technical Assistance is already required by statute (IC 13-27-6-1) to produce an annual report that includes all activities, including ESP. Based on this and similar comments, IDEM has agreed to provide a link to compliance information for regulated entities on the ESP website, directly linking each member to their most up to date compliance history. Concerned citizens have expressed a desire to keep all information updated and readily accessible. This website will provide much more recent data than an annual report that takes months to complete and publish. The report will also include the names of any member that has been removed from the program.

Comment: Sections 13 and 14 of the rule list the items that the companies or the municipalities need to provide in their annual summary. I would suggest that they also provide a summary of their compliance history for the previous year. Hopefully, the summary would be, "We were in compliance for the entire year. We received no notices of violation, we've had no agreed orders." Otherwise they probably should not be in this program. But it would provide an extra level of assurance to the public if they could see that along with the companies' progress on their beyond compliance activities, they could also see that there were no rule or law violations in the last year. It would strengthen the credibility of the program from the perspective of the public. (IKE)

Response: IDEM agrees and has provisions in the rule to address this. The ESP annual summary already requires more than a statement or history of compliance over the past year. Providing a history could be a simple acknowledgment that the source wasn't inspected that year or had nothing to report. As it stands now, the annual report requires each member to determine their compliance status at the time of submission and certify, that to their best of their knowledge and based on reasonable inquiry, it is in compliance with all applicable standards.

Comment: In general, I don't disagree that incentives need to be provided for companies to feel that this is a good thing for them. I just want to express real concern about the incentives related to inspections, and particularly preannounced inspections. I think that it is a very, very bad idea to have a system where a regulated industry gets an advance announcement, even if it's 24 hours in advance, that the inspector is coming the next day.

There are companies I've talked to that are very much beyond compliance that have said it is not an incentive they would ever accept, because they want people to know that an inspector can come any time, unannounced, and they are ready to be inspected. So, I would really urge IDEM to rethink that. (IKE)

Response: This provision is not included in the rule, however, a response is being provided in an effort to explain the rationale behind this aspect of the program. As indicated, not all members will desire to request this

incentive. However, today, more and more facilities have one environmental manager overseeing numerous facilities. These member facilities and environmental managers have earned a mere 24-hour notice to ensure they are present or have arranged for proper representation at the facility.

Currently, in an effort to ensure proper representation and inspection criteria, there are several inspection scenarios where advance announcement of the inspection is provided today, outside of ESP. It is IDEM's intent to ensure inspections of ESP facilities are credible and thorough. Proper representation is essential to such an inspection process.

Comment: One of the reasons given for preannounced inspections is that sometimes an inspector comes and the environmental manager isn't there that day because he's at another plant site and that makes the inspection difficult and it's inefficient for IDEM to have to come back another day. Because there will be relatively few companies in this program (maybe more as it gets more successful), an alternative incentive that could be offered rather than announcing the inspection a day ahead, would be for IDEM offer to come back another day if the environmental manager isn't there. That wouldn't be much of a burden on IDEM because there will be relatively few companies involved. (IKE)

Response: IDEM has limited inspection resources, therefore, it is not an efficient use of these resources to go out into the field and not conduct agency business, returning to the same facility at a later date. This proposed alternative also lends itself to "scheduling inspections" which the agency feels could jeopardize the integrity of the program.

Comment: Section 10 of the rule talks about the kinds of criteria that either will preclude a company from being considered for this program or might preclude a company from being considered for this program. It can be debated which criteria ought to be in which category. There's one in the "might" category that I would urge you to consider putting in the "shall preclude" category. If the company is in noncompliance with either a federal or a state consent decree or agreed order, it is not appropriate for the company to be eligible for this program until the problems are resolved. (IKE)

Response: This provision was recently discussed again in an effort to better understand the concern and consider this comment. It was determined that far too many insignificant conditions not related to environmental performance are included in Agreed Orders and Consent Decrees to remove IDEM's ability to assess these cases individually. However, this provision still provides IDEM with the ability to deny or revoke membership in these cases and will be used as intended to ensure and maintain a high standard of program credibility.

Comment: In relation to the ten-year permit renewals, there are circumstances under which there's some value added to reviewing some permits more frequently than once every ten years. That is a long time for a permit to go without any attention, especially if this is also a company that may be getting inspected less frequently because it's in this program. So, I would suggest that IDEM consider some form of check-in. There may well be applicable rules that have been promulgated in that period of time, and having an every-five-year look gives you a little bit more regular time to check in on things like that. (IKE)

Response: IDEM has already begun rulemaking to make this a change for all regulated entities. 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.

Comment: The comments on monthly VOC monitoring that have come in, both from my organization and from U.S. EPA, indicate there is concern with monthly averaging of VOC emissions. The health standard for ozone is a daily health standard. U.S. EPA has always insisted that companies keep daily records so that they know on a daily basis that they're meeting the standard. U.S. EPA has expressed concern with this based on their comment, and I want to register my concern about it as well. (IKE)

Response: IDEM does not believe this incentive provides reasonable opportunity to violate VOC emission limits in normal operations. The same concern relative to the averaging of noncompliant coatings with compliant coatings applies on a daily basis as well. The U.S. EPA prohibition referenced is not in any applicable federal regulations, therefore, not enforceable. IDEM has had discussions with U.S. EPA on this particular incentive and based on these discussions, believes we will reach an agreement.

326 IAC 25

SECTION 1. 326 IAC 25 IS ADDED TO READ AS FOLLOWS:

ARTICLE 25. VOLUNTARY PERFORMANCE BASED LEADERSHIP PROGRAMS

Rule 1. Environmental Stewardship Program and Comprehensive Local Environmental Action Network Community Challenge Program

326 IAC 25-1-1 Applicability

Authority: IC 13-14-8; IC 13-17-3-4; IC 13-17-3-12; IC 13-27-8-3
Affected: IC 13-15; IC 13-17

Sec. 1. (a) The Indiana Environmental Stewardship Program and Comprehensive Local Environmental Action Network Community Challenge Program are voluntary performance based leadership programs that offer recognition, regulatory flexibility, and an opportunity to work directly with the department on innovative pilot projects for entities that consistently demonstrate environmental stewardship and make measurable efforts towards continual environmental improvement. In accordance with IC 13-27-8-3, an entity is not required to comply with this rule and 326 IAC 25-2 except as a provision of participation in these programs.

(b) This rule applies to any Indiana entity that:
(1) voluntarily participates in either program;
(2) meets the eligibility requirements of section 3 of this rule; and
(3) maintains membership by complying with this rule and 326 IAC 25-2.

(Air Pollution Control Board; 326 IAC 25-1-1)

326 IAC 25-1-2 Definitions

Authority: IC 13-14-8; IC 13-17-3-4; IC 13-17-3-12
Affected: IC 13-11-2-35; IC 13-11-2-51; IC 13-15; IC 13-17

Sec. 2. In addition to the definitions in IC 13-11-2, the following definitions apply throughout this rule and 326 IAC 25-2:
(1) "Commissioner", as defined in IC 13-11-2-35(a), means the commissioner of the department of environmental management.
(2) "Comprehensive Local Environmental Action Network Community Challenge Program" or "CLEAN" means the voluntary state program for units of local government in Indiana that:
(A) demonstrate environmental stewardship; and
(B) strive for continual environmental improvement.
(3) "Department", as defined in IC 13-11-2-51, means the Indiana department of environmental management.
(4) "Entity" means a company, corporation, firm, enterprise, authority, institution, partnership, sole proprietorship, limited liability company, any person as defined in IC 13-11-2-158(a), 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 has one (1) geographic location under:
(A) at least one (1) EMS; and
(B) the direction of senior management.
(5) "Environmental aspect" means an element of the activities, products, or services of an entity that has the potential to interact with the environment.
(6) "Environmental impact" means any change to the environment, whether adverse or beneficial, wholly or partially resulting from the environmental aspects of an entity.
(7) "Environmental laws, rules, and regulations", for the purpose of this article, means the system of laws and standards administered by U.S. EPA, the department, or related local government bodies.
(8) "Environmental management system" or "EMS" means a continuous cycle of planning, implementing, reviewing, and improving a set of documented processes and practices used to develop and implement the environmental policy and manage the environmental aspects of an entity to:
(A) maintain compliance;
(B) reduce adverse environmental impacts; and
(C) increase operational efficiency.
(9) "Environmental objective" means an environmental goal that is consistent with the environmental policy of an entity.
(10) "Environmental policy" means the overall commitment and direction of an entity related to environmental performance as formally expressed by senior management.

(11) "Environmental Stewardship Program" or "ESP" means the voluntary state program for entities in Indiana that:
(A) demonstrate environmental stewardship; and
(B) strive for continual environmental improvement.
(12) "Environmental target" means a detailed performance requirement that:
(A) is quantified where practical; and
(B) arises from the environmental objectives.
(13) "Geographic location," for the purposes of this article, means an aggregation of one (1) or more operations that are:
(A) located on:
(i) one (1) piece of property; or
(ii) contiguous or adjacent properties; and
(B) owned, operated, or controlled by the same entity.
(14) "Independent audit" means an audit conducted by a party that:
(A) is not directly employed by the entity being audited; and
(B) has not played a substantive role in implementing the EMS being audited.
(15) "National Environmental Performance Track Program" or "NEPT" means the U.S. EPA's National Environmental Performance Track Program.
(16) "Senior management" means the following:
(A) For entities, the individual or individuals with executive responsibility for the entity.
(B) For a partnership or sole proprietorship, a general partner or the proprietor, respectively.
(C) For a unit of local government or other governmental unit, either a principal executive officer or ranking elected official.
(17) "U.S. EPA" means the administrator of the United States Environmental Protection Agency or the administrator's designee.

(Air Pollution Control Board; 326 IAC 25-1-2)

326 IAC 25-1-3 Eligibility criteria

Authority: IC 13-14-8; IC 13-17-3-4; IC 13-17-3-12
Affected: IC 13-15; IC 13-17

Sec. 3. Participation in ESP or CLEAN is voluntary and is open to entities located and operating in Indiana that meet the following criteria:
(1) The standard of environmental compliance as described in section 10 of this rule.
(2) Implement and maintain an EMS as described in section 11 of this rule.
(3) Conduct continuous environmental improvement initiatives as described in section 12 of this rule.

(Air Pollution Control Board; 326 IAC 25-1-3)

326 IAC 25-1-4 Membership application

Authority: IC 13-14-8; IC 13-17-3-4; IC 13-17-3-12
Affected: IC 13-15; IC 13-17

Sec. 4. (a) A member of senior management shall submit an application, preferably electronically, by one (1) of the following methods:
(1) For applications for either ESP or CLEAN only, to the department on:
(A) a form, whether electronically or hard copy, provided by the department; or
(B) an equivalent form.
(2) For applications for both ESP and NEPT, to U.S. EPA, electronically on the form provided by U.S. EPA. An application submitted to U.S. EPA satisfies the requirement for an application to the department for ESP.

(b) The application shall be signed by a member of senior management. The signature shall:
(1) constitute affirmation that the statements in the application are true and complete, as known at the time of completion of the application; and

(2) subject the member of senior management to liability under state laws forbidding false or misleading statements.

(c) A membership for an entity shall be limited to cover one (1) geographic location, except that an entity may apply for membership as a group of locations if the following criteria are met:
(1) Each location must meet the eligibility criteria individually and as a group, including the requirement to identify environmental improvement initiatives.
(2) The environmental improvement initiatives may be similar or the same for all of the locations, but each location must:
(A) play an active role in each initiative; and
(B) demonstrate continuous environmental improvement.
(3) The EMS must address staff and activities at each location.
(4) Senior management must be common to all locations.
(5) The standards of environmental compliance in section 10 of this rule shall apply to all Indiana locations under the control of the entity.

(d) The commissioner shall make a determination on acceptance into ESP or CLEAN based on the following:
(1) The EMS must meet the standards in section 11 of this rule.
(2) A site visit by a representative of the department to provide an understanding of the environmental aspects of the entity and the EMS.
(3) Identification of environmental improvement initiatives and associated objectives and targets as follows:
(A) For ESP applicants, at least one (1) environmental improvement initiative and associated objectives and targets for the first year of membership.
(B) For CLEAN applicants, at least five (5) environmental improvement initiatives and associated objectives and targets for the three (3) year term of membership.
(4) For ESP applicants, information provided to U.S. EPA if the entity has also applied for membership in NEPT.
(5) Compliance audits conducted by:
(A) the department;
(B) the U.S. EPA;
(C) other state offices; and
(D) other federal agencies;
as appropriate.
(6) Other information, including the following:
(A) Compliance information obtained from department staff.
(B) Verifiable, applicable information received from sources determined to be relevant by the commissioner.

(Air Pollution Control Board; 326 IAC 25-1-4)

326 IAC 25-1-5 Term of membership

Authority: IC 13-14-8; IC 13-17-3-4; IC 13-17-3-12
Affected: IC 13-15; IC 13-17

Sec. 5. (a) The term of membership is three (3) years from the date the entity is accepted into the program as long as the entity continues to meet the program criteria and submits the annual summary.

(b) For ESP members, the department may extend the term for up to one (1) year to coincide with the:
(1) membership date in NEPT, if applicable; or
(2) annual summary submission by allowing a member whose expiration date occurs before April 1 of that year to extend its expiration date to April 1 of that year.

(c) For CLEAN members, the department may extend the term for up to ninety (90) days to accommodate submission of the third annual summary, at which time CLEAN members may seek to renew membership in the program.

(Air Pollution Control Board; 326 IAC 25-1-5)

326 IAC 25-1-6 Renewal of ESP membership

Authority: IC 13-14-8; IC 13-17-3-4; IC 13-17-3-12
Affected: IC 13-15; IC 13-17

Sec. 6. (a) To renew ESP membership, a member of senior management shall submit a renewal application, preferably electronically, by April 1 of the third year of membership as follows:
(1) For renewal applications for ESP only, to the department on:
(A) a form, either electronically or hard copy, provided by the department; or
(B) an equivalent form.
(2) For renewal applications for both ESP and NEPT, electronically to U.S. EPA on the form provided by U.S. EPA.

(b) The application shall be signed by a member of senior management. The signature shall:
(1) constitute affirmation that the statements in the application are true and complete, as known at the time of completion of the application; and
(2) subject the member of senior management to liability under state laws forbidding false or misleading statements.

(c) The department shall review the renewal application and the annual summaries submitted during the most recent term of membership. The review of a renewal shall follow the same procedures as the review for the initial application regarding compliance checks and EMS evaluations, except a general site visit by a representative of the department shall not be required.

(d) The commissioner shall make a determination on the ESP renewal application based on the following:
(1) The EMS must continue to meet the standards in section 11 of this rule.
(2) Review of the annual summaries submitted during the previous membership term.
(3) Successful coordination with a member of senior management to set at least one (1) environmental improvement initiative and associated goals for the next year of membership.
(4) Information provided by U.S. EPA if the entity has also applied for membership in NEPT.
(5) Compliance audits conducted by:
(A) the department;
(B) the U.S. EPA;
(C) other state offices; and
(D) other federal agencies;
as appropriate.
(6) Other information, including the following:
(A) Compliance information obtained from department staff.
(B) Verifiable, applicable information received from sources determined to be relevant by the commissioner.

(Air Pollution Control Board; 326 IAC 25-1-6)

326 IAC 25-1-7 Renewal of CLEAN membership

Authority: IC 13-14-8; IC 13-17-3-4; IC 13-17-3-12
Affected: IC 13-15; IC 13-17

Sec. 7. (a) To renew CLEAN membership, a member of senior management shall submit the third annual summary of the previous membership term:
(1) to the department within sixty (60) days after the third annual anniversary of the date the previous membership term began;
(2) to clearly indicate the intention to renew membership; and

(3) including five (5) objectives, targets, and action plans for the next three (3) year term.

(b) The application shall be signed by a member of senior management. The signature shall:
(1) constitute affirmation that the statements in the application are true and complete, as known at the time of completion of the application; and
(2) subject the member of senior management to liability under state laws forbidding false or misleading statements.

(c) The department shall review the annual summaries and five (5) objectives, targets, and action plans submitted during the most recent term of membership. The review of this information shall follow the same procedures as the review for the initial application regarding compliance checks and EMS evaluations, except a general site visit by a representative of the department shall not be required.

(d) The commissioner shall make a decision on the CLEAN renewal application based on the following:
(1) The EMS must continue to meet the standards in section 11 of this rule.
(2) Review of the annual summaries submitted during the previous membership term.
(3) Successful coordination with a member of senior management to identify at least five (5) environmental improvement initiatives and associated goals for the next three (3) year term of membership.
(4) Compliance audits conducted by:
(A) the department;
(B) the U.S. EPA;
(C) other state offices; and
(D) other federal agencies;
as appropriate.
(5) Other information, including the following:
(A) Compliance information obtained from department staff.
(B) Verifiable, applicable information received from sources determined to be relevant by the commissioner.

(e) If the entity does not request a renewal with the third annual summary, then membership in CLEAN expires upon receipt by the department of the third annual summary.

(Air Pollution Control Board; 326 IAC 25-1-7)

326 IAC 25-1-8 Revocation

Authority: IC 13-14-8; IC 13-17-3-4; IC 13-17-3-12
Affected: IC 13-15; IC 13-17

Sec. 8. (a) The commissioner shall revoke membership in ESP or CLEAN if the entity has not substantially complied with any of the following:
(1) The standards of environmental compliance described in section 10 of this rule.
(2) The requirement to make sufficient progress towards attaining the environmental initiatives identified and agreed upon at the time of application and submittal of the annual summaries.
(3) The requirement to maintain an approved EMS as required for membership.
(4) The prohibition against knowingly submitting false information:
(A) on the application;
(B) in the annual summary;
(C) during a site visit or evaluation by the department; or
(D) during an independent audit.

(b) The commissioner may revoke the membership in ESP or CLEAN if the entity has not substantially complied with any of the following:
(1) The ESP or CLEAN program requirements in this article, as applicable.
(2) Federal, state, or local environmental laws, rules, and regulations.

(c) A determination by the commissioner to revoke a membership under subsection (b) may be based upon the following:
(1) Compliance information obtained from department staff.
(2) Verifiable, applicable information received from sources determined to be relevant by the commissioner.

(d) If the commissioner determines that a situation shall or may warrant revocation of membership based on subsection (a) or (b), the following applies:
(1) The commissioner shall notify the entity in writing:
(A) of any potential deficiencies found; and
(B) that the commissioner is considering removing the entity from the program.
(2) The notice shall:
(A) state that the commissioner may consider removing the entity from the program after the response time period provided to the member;
(B) identify the potential deficiencies; and
(C) provide the entity with thirty (30) days to respond.
(3) Within thirty (30) days after the end of the time period provided to the member, the commissioner shall consider the response and determine if the situation warrants revocation of membership.

(e) An entity whose membership has been revoked may reapply under section 4 of this rule at any time twelve (12) months after the revocation.

(f) Revocation of memberships shall be posted on the department Web site for the duration of the current application period.

(g) Except as described in subsection (h), immediately upon revocation, all member incentives and regulatory benefits afforded to the member of ESP or CLEAN under this article shall be revoked.

(h) An entity whose membership has been revoked subsequent to renewal of the entities FESOP or MSOP permit under 326 IAC 25-2-2 shall apply for a renewal permit with a term of not more than five (5) years within six (6) months of the date of revocation.

(Air Pollution Control Board; 326 IAC 25-1-8)

326 IAC 25-1-9 Transfers

Authority: IC 13-14-8; IC 13-17-3-4; IC 13-17-3-12
Affected: IC 13-15; IC 13-17

Sec. 9. Membership in ESP or CLEAN may be transferred to another entity at the same geographic location provided:
(1) the department is notified within ninety (90) days of the:
(A) change in ownership or management; and
(B) intent to maintain membership; and
(2) senior management commits to:
(A) fulfilling the previous member's commitments; and
(B) the requirements of the program for the remainder of the membership term by signing an updated membership application.

(Air Pollution Control Board; 326 IAC 25-1-9)

326 IAC 25-1-10 Standards of environmental compliance

Authority: IC 13-14-8; IC 13-17-3-4; IC 13-17-3-12
Affected: IC 13-15; IC 13-17

Sec. 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, based on information and belief after reasonable inquiry, the entity is currently in compliance with all applicable local, state, and federal environmental laws, rules, and regulations.

(b) The department shall:
(1) review the administrative, civil, and criminal environmental compliance and enforcement history of the entity in order to determine if the entity satisfies the required standard of substantial environmental compliance;
(2) consider all applicable environmental compliance and enforcement criteria, including the criteria in subsections (c) and (d) in determining whether or not an entity has achieved substantial environmental compliance; and
(3) post the organizational name and location for all new and renewal applications on the department Web site within fourteen (14) days of the close of each application submission round.

(c) The following criteria shall prevent acceptance of an entity into the ESP or CLEAN:
(1) Corporate criminal conviction or guilty plea for environmentally-related violations of criminal laws involving the entity or an officer of the entity within the past five (5) years.
(2) Criminal conviction or plea of employee at the entity for environmentally-related violations of criminal laws within the past five (5) years.

(d) The existence of one (1) or more of the following criteria may prevent acceptance of an entity into ESP or CLEAN:
(1) Ongoing criminal investigation or prosecution of the entity, or an officer or employee of the entity, for a violation of environmental law.
(2) Three (3) or more significant violations at the entity in the past three (3) years.
(3) Unresolved or unaddressed significant noncompliance or significant violations.
(4) Planned, but not yet filed, judicial or administrative action, by U.S. EPA or the department, against the entity.
(5) Ongoing U.S. EPA or department-initiated litigation against the entity.
(6) A situation where an entity is not in compliance with the schedule and terms of an order or decree issued by:
(A) U.S. EPA; or
(B) the department.
(7) A history of significant environmental problems or a pattern of noncompliance at the entity or at other affiliated entities under the same ownership or control.

(Air Pollution Control Board; 326 IAC 25-1-10)

326 IAC 25-1-11 Environmental management system

Authority: IC 13-14-8; IC 13-17-3-4; IC 13-17-3-12
Affected: IC 13-15; IC 13-17

Sec. 11. (a) An approved EMS must be implemented by the entity before acceptance of an entity into ESP or CLEAN.

(b) An EMS that meets the criteria for ESP and CLEAN must, at a minimum, include the following:
(1) Evidence of senior management support, commitment, and approval provided through management review of records, employee interviews, or signatory reference to the applicant's environmental policy.
(2) A written environmental policy directed toward the following:
(A) Compliance.
(B) Pollution prevention.
(C) Continuous improvement.
(3) For CLEAN members, the environmental policy must also address sharing environmental decisions and performance information with the community.
(4) Identification of the environmental aspects at the entity.

(5) Prioritization of the environmental aspects and a determination of those aspects deemed significant by the entity considering, at the minimum, environmental impacts and applicable laws, rules, and regulations.
(6) Established priorities and environmental objectives and targets for the following:
(A) Continuous improvement in environmental performance.
(B) Ensuring compliance with applicable environmental laws, rules, regulations, and permit conditions.
(7) An established community outreach mechanism that includes the following:
(A) Identifying and responding to community concerns.
(B) Informing the community of important matters that affect the community.
(C) Reporting on the EMS, including, at a minimum, reporting to the public on the environmental policy and significant aspects.
(D) Through the annual summary, reporting on the environmental improvement initiatives, including progress towards the most recent environmental improvement initiatives identified in the application or annual summary.
(8) Incorporation of environmental and pollution prevention planning in the development of new products, processes, and services and modifications of existing processes.
(9) Evidence of clear responsibility by the entity for the following:
(A) Implementation, training, monitoring, EMS maintenance, and taking corrective action.
(B) Ensuring compliance with applicable environmental laws, regulations, and permit conditions.
(10) Documentation of the implementation procedures and the results of implementation.
(11) Appropriately written EMS procedures to include documented plans, records, and procedures as needed for successful implementation of an EMS as defined in section 2(8) of this rule.
(12) An annual evaluation of the EMS with written results provided to senior management and affected employees.

(c) For CLEAN members, the environmental policy must be adopted through an executive order, resolution, or ordinance.

(d) The department shall determine if the EMS meets the criteria in subsection (b).

(e) A representative of the department shall perform an on-site review, evaluation, and verification of the EMS if, within twelve (12) months of the application submittal, the EMS has not been:
(1) audited by an independent party; or
(2) registered pursuant to a recognized certification standard.

(Air Pollution Control Board; 326 IAC 25-1-11)

326 IAC 25-1-12 Continuous environmental improvement

Authority: IC 13-14-8; IC 13-17-3-4; IC 13-17-3-12
Affected: IC 13-15; IC 13-17

Sec. 12. (a) In coordination with the department, a member of senior management shall identify continuous environmental improvement initiatives for the appropriate program, as follows:
(1) For ESP, a member of senior management shall identify three (3) continuous environmental improvement initiatives for each membership term. One (1) initiative shall be identified at the time of the initial or renewal application and the remaining initiatives shall be identified each year at the time the annual summary is submitted to the department.
(2) For CLEAN, a member of senior management shall identify five (5) continuous environmental improvement initiatives for the three (3) year membership term.

(b) Entities accepted into ESP or CLEAN shall:
(1) maintain records that describe and track the actions taken toward achievement of the environmental improvement initiatives; and
(2) submit an annual summary in accordance with section 13 or 14 of this rule, as applicable, documenting progress toward the environmental improvement initiatives for that year.

(c) Entities accepted into ESP or CLEAN shall demonstrate continuous environmental improvement by the following:
(1) Conducting periodic pollution prevention or environmental improvement assessments that identify opportunities for reducing pollution and eliminating waste at the entity.
(2) Identifying, obtaining approval for, and implementing environmental improvement initiatives in coordination with the department that:
(A) include objectives and targets beyond current legal requirements; and
(B) as applicable, specify the:
(i) environmental media;
(ii) types of pollution to be prevented or reduced;
(iii) implementation activities; and
(iv) projected time frames.
(3) Reporting on the activities undertaken toward implementation of the initiatives identified with the department.

(Air Pollution Control Board; 326 IAC 25-1-12)

326 IAC 25-1-13 Annual summary for ESP members

Authority: IC 13-14-8; IC 13-17-3-4; IC 13-17-3-12
Affected: IC 13-15; IC 13-17

Sec. 13. (a) Entities accepted into ESP shall submit an annual summary on a form provided by the department or an equivalent form documenting the following:
(1) Progress toward the objectives and targets identified for the environmental improvement initiative for that year.
(2) Results obtained from achieving the environmental improvement initiative objectives and targets, if applicable.
(3) An annual review of the EMS by the entity.

(b) If the entity has not attained the objectives and targets associated with an environmental improvement initiative, a member of senior management shall provide the following:
(1) Verification of continued progress toward the objectives and targets.
(2) A description of the reason the objectives and targets have not been attained.

(c) Each annual summary must include identification of the environmental improvement initiative for the next year, unless the entity is terminating membership in ESP.

(d) The annual summary shall:
(1) cover the twelve (12) month calendar year;
(2) be submitted to the department for each year by April 1 of the following year; and
(3) be submitted for each calendar year in which the entity has been a member for at least three (3) full months.

(e) An annual summary submitted to U.S. EPA as a requirement of being a member of NEPT shall satisfy the requirement for an annual summary for ESP members.

(Air Pollution Control Board; 326 IAC 25-1-13)

326 IAC 25-1-14 Annual summary for CLEAN members

Authority: IC 13-14-8; IC 13-17-3-4; IC 13-17-3-12
Affected: IC 13-15; IC 13-17

Sec. 14. (a) Entities accepted into CLEAN shall submit an annual summary on a form provided by the department or an equivalent form documenting the following:

(1) Progress toward the objectives and targets identified for the five (5) environmental improvement initiatives.
(2) Results obtained from achieving the environmental improvement initiative objectives and targets, if applicable.
(3) An annual review of the EMS by the entity.

(b) If the entity has not attained the objectives and targets associated with an environmental improvement initiative at the time the third annual summary is submitted, a member of senior management shall provide a description of the reason the objectives and targets have not been attained.

(c) The annual summary shall be submitted to the department sixty (60) days after the annual anniversary of the date the previous membership term began.

(Air Pollution Control Board; 326 IAC 25-1-14)

Rule 2. Regulatory Flexibility for the Environmental Stewardship Program, Comprehensive Local Environmental Action Network Community Challenge Program, and Incorporation by Reference of NEPT Incentives

326 IAC 25-2-1 Incorporation by reference of federal incentive for NEPT members

Authority: IC 13-14-8; IC 13-17-3-4; IC 13-17-3-12
Affected: IC 13-15; IC 13-17

Sec. 1. The air pollution control board incorporates by reference the Performance Track provisions at 40 CFR 63.2*, 40 CFR 63.10*, and 40 CFR 63.16*. The incentives in these federal rules are only available to members of the NEPT program.

***This body of documents is incorporated by reference. Copies may be obtained from the Government Printing Office, 732 North Capitol Street NW, Washington, D.C. 20401 or are available for review and copying at the Indiana Department of Environmental Management, Office of Air Quality, Indiana Government Center-North, Tenth Floor, 100 North Senate Avenue, Indianapolis, Indiana 46204.**

(Air Pollution Control Board; 326 IAC 25-2-1)

326 IAC 25-2-2 Ten year permit renewals

Authority: IC 13-14-8; IC 13-17-3-4; IC 13-17-3-12
Affected: IC 13-15-3-2; IC 13-17

Sec. 2. (a) Notwithstanding 326 IAC 2-1.1-9.5 and 326 IAC 2-8-4(2) and in accordance with IC 13-15-3-2, a federally enforceable state operating permit (FESOP) for a member in ESP or CLEAN may be renewed for a period of up ten (10) years, if approved by the commissioner.

(b) Notwithstanding 326 IAC 2-1.1-9.5 and 326 IAC 2-6.1-7(a) and in accordance with IC 13-15-3-2, a minor state operating permit (MSOP) for a member in ESP or CLEAN may be renewed for a period of up ten (10) years, if approved by the commissioner.

(Air Pollution Control Board; 326 IAC 25-2-2)

326 IAC 25-2-3 Monthly compliance methods for volatile organic compound

Authority: IC 13-14-8; IC 13-17-3-4; IC 13-17-3-12
Affected: IC 13-15-3-2; IC 13-17

Sec. 3. (a) Notwithstanding 326 IAC 8-1-2(a)(7), the emission limitations specified in 326 IAC 8 can be achieved through monthly volume-weighted averaging of all coatings applied in a coating line or printing line subject to the requirements in 326 IAC 8-2 or 326 IAC 8-5-5.

(b) Sufficient records must be maintained to demonstrate compliance with the applicable emission limitation on a monthly average basis. The records must be made available to the department upon request.

(c) Records of monthly VOC emissions shall be maintained in:
(1) pounds per month; or
(2) tons per month.

(d) If monthly records sufficient to determine an accurate monthly weighted average are not available, each coating, ink, and solvent shall meet the requirements of the applicable section.

(Air Pollution Control Board; 326 IAC 25-2-3)

326 IAC 25-2-4 Pollution prevention projects

Authority: IC 13-14-8; IC 13-17-3-4; IC 13-17-3-12
Affected: IC 13-15-3-2; IC 13-17

Sec. 4. Notwithstanding 326 IAC 2-6.1-6(i)(1)(J) and 326 IAC 2-8-11.1(f)(1)(J), any pollution prevention project, as defined in 326 IAC 2-1.1-1(14), that would otherwise be subject to significant permit revision procedures, and that does not result in a net increase in potential emissions of more than the significance levels in 326 IAC 2-2-1(xx), may be processed as a minor permit revision as follows:
(1) For minor state operating permits, under 326 IAC 2-6.1-6(h).
(2) For federally enforceable operating permits, under 326 IAC 2-8-11.1(e).

(Air Pollution Control Board; 326 IAC 25-2-4)

Notice of Public Hearing

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