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TITLE 326 AIR POLLUTION CONTROL BOARD

FINDINGS AND DETERMINATION OF THE COMMISSIONER PURSUANT TO IC 13-14-9-8 AND DRAFT RULE #04-180(APCB)

DEVELOPMENT OF NEW RULES AND AMENDMENTS TO RULES CONCERNING CREDIBLE EVIDENCE

PURPOSE OF NOTICE

The Indiana Department of Environmental Management (IDEM) has developed draft rule language for a new rule, 326 IAC 1-1-6, concerning the federal credible evidence revisions published in the Federal Register on February 24, 1997 (62 FR 8313), and has scheduled a public hearing/meeting before the air pollution control board (board) for consideration of preliminary adoption of these rules.

CITATIONS AFFECTED: 326 IAC 1-1-6.

AUTHORITY: IC 13-14-8; IC 13-17-3-4; IC 13-17-3-11.

STATUTORY REQUIREMENTS

IC 13-14-9-8 recognizes that under certain circumstances it may be appropriate to reduce the number of public comment periods routinely provided. In cases where the commissioner determines that there is no anticipated benefit from the first and second public comment periods, IDEM may forego these comment periods and proceed directly to the public hearing and board meeting at which the draft rule is considered for preliminary adoption. Two (2) opportunities for public comment (at the public hearings prior to preliminary and final adoption of the rule) remain under this procedure.

If the commissioner makes the determination of no anticipated benefit required by IC 13-14-9-8, the commissioner shall prepare written findings and publish those findings in the Indiana Register prior to the board meeting at which the draft rule is to be considered for preliminary adoption, and include them in the board packet prepared for that meeting. This document constitutes the commissioner's written findings pursuant to IC 13-14-9-8.

The statute provides for this shortened rulemaking process if the commissioner determines that:

(1) the rule constitutes:

(A) an adoption or incorporation by reference of a federal law, regulation, or rule that:

(i) is or will be applicable to Indiana; and

(ii) contains no amendments that have a substantive effect on the scope or intended application of the federal law or rule;

(B) a technical amendment with no substantive effect on an existing Indiana rule; or

(C) a substantive amendment to an existing Indiana rule, the primary and intended purpose of which is to clarify the existing rule; and

(2) the rule is of such nature and scope that there is no reasonably anticipated benefit to the environment or the persons referred to in IC 13-14-9-7(a)(2) from:

(A) exposing the rule to diverse public comment under section IC 13-14-9-3 or IC 13-14-9-4;

(B) affording interested or affected parties the opportunity to be heard under IC 13-14-9-3 or IC 13-14-9-4; and

(C) affording interested or affected parties the opportunity to develop evidence in the record collected under IC 13-14-9-3 and IC 13-14-9-4.

BACKGROUND

Background and justification of IC 13-14-9-8

IDEM is proposing to add a new section, 326 IAC 1-1-6, under the general provisions, that will provide for the use of information other than specific reference test results under 40 CFR 60, Appendix A to prove or disprove violations

of the Clean Air Act (CAA) or other applicable requirements. This non-reference information is known as credible evidence. Indiana is required to incorporate credible evidence provisions into state rules consistent with the SIP call published by U.S. EPA in 1997 (62 FR 8314).

The credible evidence revisions are based on EPA's statutory authority to use any available information, not just data from reference tests or other federally promulgated or approved compliance methods, to prove CAA violations. In addition to clarifying EPA's, states' and citizens' enforcement authorities under the Act, the credible evidence revisions eliminate any potential ambiguity regarding the use of non-reference test data as a basis for Title V compliance certifications.

The state rule will make it clear that various information, other than reference test data, which is often available and used for other purposes, may be used to demonstrate compliance or noncompliance with emission standards. This information may be in the form of non-reference test data or monitoring or production records. The credible evidence revision will not change or affect the stringency of any emission standards. It will also not affect compliance obligations such as exceptions for startup, shutdown, and malfunctions. This rule does not designate any particular data as probative of a violation of an emission standard. Rather, it only removes what might be construed to be a regulatory bar to the admission of non-reference test data to prove a violation of an emission standard or to use as the basis for certifying compliance. The credible evidence provision would also be available to businesses to support a claim of compliance just as it may be used as evidence of a violation.

This rulemaking also does not affect whether emission standards require intermittent or continuous compliance. U.S. EPA's and IDEM's position continues to be that an emission standard requires continuous compliance unless the emission standard specifically provides otherwise. Because many emission standards do not have reference methods that can supply compliance-related information on a continuous basis, this rule clarifies that there is a role for non-reference information.

In conclusion, this rule action is only intended to incorporate the federal credible evidence rule published in the Federal Register notice of February 24, 1997 (62 FR 8313). This rule incorporates the intent of the federal rule in full-text form and, therefore, is appropriate for the use of the Indiana notice provision under IC 13-14-9-8.

IC 13-14-9-4 Identification of Restrictions and Requirements Not Imposed Under Federal Law

No element of the draft rule imposes either a restriction or a requirement on persons to whom the draft rule applies that is not imposed under federal law. This rule is required by federal rule.

Potential Fiscal Impact

There is no fiscal impact imposed as a result of this state rule that is not currently imposed by the federal standard. Any fiscal impact was addressed during the federal rulemaking process.

Public Participation and Workgroup Information

No workgroup is planned for the rulemaking. If you feel that a workgroup or other informal discussion on the rule is appropriate, please contact Christine Pedersen, Rules Development Section, Office of Air Quality at (317) 233-6868 or (800) 451-6027 (in Indiana).

FINDINGS

The commissioner of IDEM has prepared findings regarding rulemaking on credible evidence as required by federal rule. These findings are prepared under IC 13-14-9-8 and are as follows:

- (1) This rule is the direct adoption of federal requirements that are applicable to Indiana and it contains no amendments that have a substantive effect on the scope or intended application of the federal rule.
- (2) Indiana is required by federal law to adopt the federal credible evidence requirement as established by the United States Environmental Protection Agency.
- (3) I have determined that under the specific circumstances pertaining to this rule there would be no benefit to the environment, or to persons to be regulated or otherwise affected by this rule, from proceeding with the first and second public comment periods.
- (4) The draft rule is hereby incorporated into these findings.

Lori F. Kaplan

Commissioner

Indiana Department of Environmental Management

ADDITIONAL INFORMATION

Additional information regarding this action may be obtained from Christine Pedersen, Rules Development Section, Office of Air Quality (317) 233-6868 or (800) 451-6027 (in Indiana).

DRAFT RULE

SECTION 1. 326 IAC 1-1-6 IS ADDED TO READ AS FOLLOWS:

326 IAC 1-1-6 Credible evidence

Authority: IC 13-14-8; IC 13-17-3-4; IC 13-17-3-11; IC 13-17-3-12

Affected: IC 13-11; IC 13-17

Sec. 6. For the purpose of submitting compliance certifications or establishing whether or not a person has violated or is in violation of any emission limitation, standard, or rule in this title, nothing in this title shall preclude the use, including the exclusive use, of any credible evidence or information relevant to whether a source would have been in compliance with the emission limitation, standard, or rule, if the appropriate performance or compliance test or procedure had been performed. (Air Pollution Control Board; 326 IAC 1-1-6)

Notice of First Meeting/Hearing

Under IC 4-22-2-24, IC 13-14-8-1, IC 13-14-8-2, and IC 13-14-9, notice is hereby given that on September 1, 2004 at 1:00 p.m., at the Indiana Government Center-South, 402 West Washington Street, Conference Center Room A, Indianapolis, Indiana the Air Pollution Control Board will hold a public hearing on 326 IAC 1-1-6, credible evidence.

The purpose of this hearing is to receive comments from the public prior to preliminary adoption of these rules by the board. All interested persons are invited and will be given reasonable opportunity to express their views concerning the proposed amendments. Oral statements will be heard, but, for the accuracy of the record, all comments should be submitted in writing.

Additional information regarding this action may be obtained from Christine Pedersen, Rules Development Section, Office of Air Quality, (317) 233-6868 or (800) 451-6027 (in Indiana).

Individuals requiring reasonable accommodations for participation in this event should contact the Indiana Department of Environmental Management, Americans with Disabilities Act coordinator at:

Attn: ADA Coordinator

Indiana Department of Environmental Management

100 North Senate Avenue

P.O. Box 6015

Indianapolis, Indiana 46206-6015

or call (317) 233-0855), (TDD): (317) 233-6565. Speech and hearing impaired callers may contact IDEM via the Indiana Relay Service at 1-800-743-3333. Please provide a minimum of 72 hours' notification.

Copies of these rules are now on file at the Office of Air Quality, Indiana Government Center-North, 100 North Senate Avenue, Tenth Floor East and Legislative Services Agency, One North Capitol, Suite 325, Indianapolis, Indiana and are open for public inspection.