TITLE 326 AIR POLLUTION CONTROL BOARD

LSA Document #00-137

SUMMARY/RESPONSE TO COMMENTS RECEIVED AT THE FIRST PUBLIC HEARING

On February 7, 2001, the air pollution control board (board) conducted the first public hearing/board meeting concerning the development of new rules 326 IAC 10-3 and 326 IAC 10-4. Comments were made by the following parties:

Aluminum Corporation of America	(ALCOA)
American Electric Power	(AEP)
Cinergy	(CIN)
Clean Air Action Corporation	(CAAC)
Citizens Action Coalition of Indiana	(CAC)
Citizens Thermal Energy	(CTE)
Concerned Citizens of Grant County	(CCGC)
Enron Corporation	(EC)
Environmental Law and Policy Center of the Midwest	(ELPCM)
EnviroPower of Indiana	(EPI)
Firestone Building Products Company	(FBP)
Hoosier Energy REC, Incorporated	(HE)
Hoosier Environmental Council	(HEC)
Indiana Community Action Association	(ICAA)
Indiana Electric Utility Air Work Group	(IEUWG)
Indiana Kentucky Electric Company	(IKEC)
Indiana Petroleum Council	(IPC)
Indiana Power and Light Company	(IPL)
Ispat Inland, Incorporated	(III)
Steve Loeschner	(SL)
NiSource	(NS)
Save the Dunes Council	(SDC)
Save the Valley	(SV)
Sierra Club, Hoosier Chapter	(SC)
Tenaska	(TNA)
United Auto Workers, Local 2209	(UAW)
Valley Watch, Incorporated	(VWI)

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

General

Comment: IDEM should provide information about the health benefits of the rulemaking. Health issues should be considered and control should be required over the entire year and not just the ozone season. (SL)

Response: The purpose of this rulemaking is to reduce ozone levels within Indiana and ozone transport from Indiana to downwind states. It is entirely motivated by the goals of meeting health standards for ozone and improving public health. Scientific data developed by states, U.S. EPA and independent scientists over many years demonstrates the importance and need for NO_x reductions to meet those health goals. In implementing the reductions called for in this rule, IDEM will be taking important steps toward meeting the one (1) hour ozone standard in Indiana and elsewhere. By reducing NO_x emissions and associated ozone levels, the rule will provide health benefits to citizens in Indiana and downwind states. Because ozone formation is a summer season problem, the rule focuses on obtaining the necessary reductions when the public health problem is prevalent. The specific amount of NO_x reduction required in this rule are prescribed by the federal NO_x regulation.

Comment: IDEM should include more flexibility in the rulemaking. The current rule provides a short compliance time, few technology choices and limited flexibility. IDEM should focus on getting NO_x reductions and not where the reductions are coming from. Obtaining NO_x voluntary reductions from more cost-effective sources increases the flexibility and lowers the costs. (CAAC) (CIN) (IPL) (NS)

Response: IDEM agrees that the rule should be as flexible as possible without jeopardizing approval by U.S. EPA. IDEM is considering language that would allow other types of sources to participate in the trading system by generating credits through NO_x reductions. IDEM will discuss the possibility of generating credits from “non-budget” sources with U.S. EPA.

Comment: The draft rule represents a considerable effort to address concerns raised during the formal comment period. However, there has been little time to sufficiently analyze all the implications of the substantial changes and to make constructive suggestions. The U.S. EPA under the previous administration was relatively inflexible regarding the method a state would use to achieve the reduction of ozone transport and its precursors. The fear of sanctions, even though the sanctions would not be initiated until 2002, and U.S. EPA pressure appear to be the force driving the current fast track schedule and preventing IDEM from fully developing more flexible options. The board should direct IDEM to take some additional time to work out some of the complex details of the rulemaking and to develop this rule in a manner that will minimize the impact on Indiana business and its citizens while still meeting the environmental goals. (IEUWG)

Response: IDEM believes it is important to keep the rule moving through the process. Although there has been no indication that U.S. EPA intends to change its policy or position on adoption and implementation of NO_x rules by the states, Indiana's current schedule provides the additional time suggested by the commenters prior to consideration of final adoption.

Comment: IDEM should not mandate on-site retention of records and companies with multiple sources should be given the option of centralized record keeping. (IEUWG)

Response: IDEM understands the problem of record retention at un-staffed sites, but also agrees with U.S. EPA that any centralized record keeping must have some limitations to ensure that records are reasonably available.

Comment: The board should not delay the rulemaking and should go forward with preliminary adoption. Any unresolved issues can be resolved between preliminary and final adoption. (HEC) (SC) (CCGC) (HE)

Response: IDEM agrees and will work with affected sources and interested parties to resolve outstanding issues prior to final adoption.

Small Source Exemption

Comment: The inclusion of language exempting sources restricting emissions below twenty-five (25) tons during the ozone season from compliance with the rule is supported. However, the language should be revised to reduce complexity and provide clarity. (AEP)

Response: IDEM has been discussing, and will continue to discuss, the exemption language with U.S. EPA to develop language that is clear and provides flexibility without being overly complex.

Section 126

Comment: IDEM should not include sources that are affected by the Section 126 requirements in this rulemaking. The language should be revised to exempt these sources from this rule. The proposed language is not specific enough to address the complexities of the transition that would be needed to incorporate the Section 126 sources into this rule. IDEM should advocate that U.S. EPA withdraw the Section 126 rule once Indiana submits a compliant rule. (CIN) (IEUWG) (AEP)

Response: IDEM understands the concerns with transitioning between the Section 126 rule and this rulemaking. IDEM will continue discussions with U.S. EPA, sources and the public on this subject.

Comment: The rule should not be preliminarily adopted at this time. The rulemaking should be delayed for a few months so that IDEM can work with the new U.S. EPA administration to resolve how sources subject to the Section 126 rule will be treated. There is still litigation pending on the

Section 126 rule and U.S. EPA had previously stated that sources would not be subject to the Section 126 remedy if a state had an approved SIP call rule. (IKEC)

Comment: IDEM should delay this rulemaking and wait for the pending decision in the D.C. Circuit Court of Appeals in the Section 126 litigation and the pending litigation relating to the allowance allocations on which this rule is based. (AEP)

Response: As noted in a previous response, IDEM believes that moving forward on the current schedule is essential. Any changes in the legal status of the Section 126 rules can either be addressed prior to final adoption or subsequently, through amendments to the rule, if necessary.

Permitting Issues

Comment: There is a concern with the current new source review requirements for nonattainment areas. The rules should be revised to address the installation of pollution control projects and remove the permitting threshold for NO_x. (IPC) (III)

Response: Section 182(f) of the Clean Air Act (CAA) required that NO_x be treated as a nonattainment pollutant for ozone in Lake and Porter counties in the same manner as volatile organic compounds (VOCs). The provisions were adopted by the air pollution control board in July of 1993, published in the Indiana Register in January 1994, and incorporated into the state implementation plan (SIP). On January 26, 1996 in 40 CFR 52.777(i), the U.S. EPA granted a waiver of the requirements of section 182(f) of the CAA for Lake and Porter counties, including the lower NO_x threshold for nonattainment new source review. Since the treatment of NO_x as a nonattainment pollutant for ozone is no longer a CAA-required part of the SIP and the NO_x SIP Call addresses the role of NO_x in ozone nonattainment areas, IDEM will remove the section 182(f) requirements from the new source review rules. Therefore, since Indiana does not have any nonattainment areas for NO_2, the portions of the modifications involving increases in NO_x would be reviewed under the Prevention of Significant Deterioration (PSD) requirements in 326 IAC 2-2.

It should be noted that if a pollution control project does not qualify as a physical or operational change and/or does not result in a significant net emissions increase of any regulated pollutant, it is not considered a major modification under 326 IAC 2-2 or 2-3. If the project is not considered a major modification, the project is exempt from major new source review and permitting requirements without having to be reviewed as a pollution control project exemption. Sources should refer to the U.S. EPA guidance memorandum, "Pollution Control Projects and New Source Review (NSR) Applicability" (July 1, 1994) as well as the WEPCO decision for guidance in determining whether a project is a major modification or exempt. IDEM has also requested U.S. EPA to provide more specific guidance on permitting issues related to the NO_x SIP call. If a pollution control project in a nonattainment area does result in a significant net increase in emissions of the nonattainment pollutant, the project will have to meet the requirements of and be reviewed in accordance with the U.S. EPA guidance as a significant source modification. These requirements include obtaining offsets for the nonattainment pollutants that

will be part of the significant net increase in emissions. Therefore, while the guidance provisions are not specifically stated in the rules, IDEM will consider the guidance provisions when an application is received for review. IDEM will also continue to consider ways to address permitting issues associated with the installation of NO_x control equipment needed to comply with the rule.

Comment: There is a serious concern over an abuse of the current permitting system with regard to "peaker plants". These sources are being allowed to be permitted as "minor sources", but stricter controls need to be put in place to protect affected citizens. Sources should be defined and regulated based on equal periods of operation, especially peaker plants that have a much more concentrated operating year that leads to a more concentrated daily level of pollution. (CCGC)

Response: IDEM appreciates the public's concern regarding air permits for "peaker plants". The major source permitting rules base applicability on a tons per year basis; therefore, sources are allowed to request limits on their potential to emit on a tons per year basis to restrict them to below major source applicability levels. During the permitting process, sources must demonstrate that they can comply with the state and federal requirements and the limits they request, and the air quality modeling must show that emissions from these sources will not cause or contribute to a violation of the National Ambient Air Quality Standards (NAAQS) and must demonstrate that their emissions will not have a significant impact on the environment and human health. While it is not typically prohibited for sources to concentrate their operating year into a short time period, it is taken into account by using air quality models to determine the impact of a new source's emissions on the surrounding area. IDEM determines if the emissions will cause or significantly contribute to a violation of air quality standards by comparing the modeling results with the NAAQS and maximum allowable increases under the Prevention of Significant Deterioration (PSD) rules. The models typically use the proposed maximum hourly emission rate of the source (after required controls and considering any required hourly emission limits) to determine the impacts such that the worst case exposures are considered.

Comment: IDEM should include a clear, concise statement that the required pollution control equipment installation for the rule is exempt from new source permitting requirements. Requiring these projects to go through the permitting process would likely result in delays with already extremely tight construction schedules. IDEM's responses to date have been vague and ambiguous. The air pollution control board (board) should direct IDEM to provide clarity and guidance on this issue. (IPL)

Response: IDEM appreciates that sources need clear guidance on this issue and has asked U.S. EPA to provide more specific interpretations. As IDEM has stated previously, based on conversations with U.S. EPA to date, it does anticipate that the installation of NO_x controls would be a pollution control project and exempt from permitting. However, IDEM cannot make a broad statement that any of the construction is exempt from permitting requirements without knowing specifics of the projects, especially for federal permitting requirements. IDEM will continue to explore ways to address permit requirements for plant changes required to comply with this rulemaking.

Compliance Supplement Pool

Comment: There is a continuing concern that significant technological challenges caused by this rule could result in a potential risk to electrical reliability. U.S. EPA underestimated the costs and the number of control devices needed to comply with the rule. The potential risk to electrical reliability can be addressed by doubling the amount of allowances in the compliance supplement pool. (CIN) (IEUWG)

Response: U.S. EPA has not indicated that this proposal would be approved, but IDEM will continue discussions with U.S. EPA about possible alternatives.

Comment: The proposal to allow potentially up to fifty percent (50%) of all compliance supplement pool allowances for direct compliance extensions is opposed. We do not believe that the showing required by U.S. EPA to obtain a direct compliance extension can be met and there is no need for these provisions. (IEUWG)

Response: The rule, as written, would not allow up to fifty percent (50%) of the CSP to go solely for demonstrations of need, unless there were no requests for early reductions during the 2003 ozone control period. IDEM anticipates that many more sources will be generating early reduction credits and not relying on the demonstration of need. While the demonstration may be difficult for EGUs, as currently written, U.S. EPA and IDEM have included the option for nonEGUs also. In addition, IDEM continues discussions with U.S. EPA concerning acceptable alternative language.

Comment: IDEM should not allow nonEGUs to participate from the compliance supplement pool (CSP). This pool was intended to assist EGUs and help mitigate potential electric system reliability issues and the inclusion of nonEGUs could take a larger percentage of the allowances from the pool from sources it was intended to assist. NonEGUs are not required to make the significant reductions that the EGUs will have to make, so these sources do not need allowances from the CSP. (IEUWG)

Response: IDEM disagrees. Although electric reliability issues are discussed in the SIP call, 63 FR 57428-57430, U.S. EPA also discusses nonEGUs. In fact, U.S. EPA discusses and included rule language that would allow nonEGUs to receive allowances for early reduction credits or a demonstration of need. Some nonEGUs in Indiana will be required to install control equipment and are in a position similar to that of EGUs.

Comment: IDEM should conduct a preliminary, advance allocation of early reduction credits (ERCs) based on each source's contribution to total heat input in Indiana. This approach will provide companies with compliance certainty, but will nonetheless ensure that companies actually reduce emissions before they are eligible for CSP credits. (IEUWG)

Response: It is not clear that this will, in fact, provide the certainty stated. IDEM does not believe that an advance allocation based on heat input contribution would provide any certainty of the

allowances that may actually be awarded. The award will be made on the difference in emission rates between the baseline year and the reduction year. The sources with the greatest reduction will receive the greatest reward subject to adjustments that would be made prior to the allocation.

Comment: The CSP allowances should be exempt from flow control, consistent with the final Section 126 rule. (IEUWG)

Response: Reviewing the language under the Section 126 rule, 40 CFR 97, it does not appear that the CSP allowances are exempt from flow control, except for the first year 2003. The language under 40 CFR 97.43(c)(8) states that the allowances will be treated as banked allowances in 2004, the second year of the program. Because the allowances would be treated as banked allowances, the flow control provisions would apply and this is consistent with the language in this rule that treats these allowances as banked allowances in 2005.

Alternative Compliance Plans

Comment: The rulemaking should be delayed until IDEM can discuss the alternative compliance plans, such as the Ohio proposal, have been throughly discussed with U.S. EPA. IDEM has stated in the response to comments that U.S. EPA has indicated that this proposal would not be approvable. IDEM should continue to pursue this with the new U.S. EPA administration and a delay of a few months would allow these discussions to take place. (IKEC)

Comment: IDEM should address reliability concerns by adopting the approach advocated by Ohio. This proposal would advance the compliance deadline to May 1, 2004 and allocate an additional block of allowances equal to twenty percent (20%) of the source's 2007 baseline emissions which would cover the emissions from May 1 to May 30. (IEUWG)

Response: IDEM will continue to discussion these provisions with U.S. EPA prior to final adoption.

Comment: IDEM has the opportunity to encourage utilities to go beyond the mandatory NO_x reductions by providing a mechanism for utilities to voluntarily apply technologies that reduce multiple pollutants. The inclusion of such a program will enhance Indiana's environment over the long term. Some of Indiana's neighboring states have included such a program in their draft rules and we believe IDEM has the authority to include and U.S. EPA has the authority to approve such a program. A multi-pollutant reduction program will allow Indiana and U.S. EPA to address air quality issues on a more holistic, cost effective and environmentally sound manner. (AEP)

Response: While some other states have proposed this option as part to their SIP call rulemaking, information to date indicates that U.S. EPA has objected to this proposal. In addition, information from West Virginia indicates that the state withdrew this option after U.S. EPA objections.

New Source Set-aside

Comment: There is concern that the five percent (5%) set-aside will be oversubscribed and that new sources will not receive necessary allowances and will be forced to purchase allowances from the market, if a willing seller can be found. These concerns and problems may increase when the set-aside is reduced to two percent (2%). This is especially true with the current rule language that could force a new source to obtain allowances from the set-aside for as much as six (6) years. These provisions could discourage the construction of new base load plants. IDEM should revise the language to increase the set-aside to ten percent (10%) for the first two (2) allocation periods, allocate allowances on an annual basis three (3) years in advance, and return any unused allowances to the new source pool for pro-rata distribution each year. Another alternative would be for the state to hold all allowances and auction the allowances to both existing and new sources each year. The proceeds could be used to fund energy efficiency, pollution reduction or renewable resource project grants. (EPI)

Comment: The size of the new source set-aside is too small and the time to get out of the pool and receive allowances as an existing source is too long. IDEM should revise the rule to include annual allocations. (TNA)

Response: IDEM understands the concerns about the availability of allowances for new sources and the amount of time a source would need to draw from the set-aside. IDEM must balance the need for new source allowances with the amount of control and associated costs for existing sources, because an increase in the allowance set-aside means a greater amount of control is needed by existing sources. Holding an auction could require sources that have made large investments in control measures to spend even more money to acquire allowances. IDEM will continue to review these issues, especially the transition from a "new" to an "existing" source, and discuss possible alternatives with interested parties.

Comment: The new source set-aside provisions should be revised as follows:

- Allowances should be allocated on a first-come, first-served basis, based on the date the source is issued an approved construction permit.
- New sources should be required to return any unused allowances and those allowances should be allocated to other new sources that did not receive sufficient allocations.
- Any unused allowances after reallocation to other new sources should be returned to existing sources.
- After two (2) years of operation, new sources should receive a fixed allocation for the remainder of the applicable allocation period. (IEUWG)

Response: IDEM believes that a pro-rata distribution is a fairer method of distributing the allowances to ensure that all projects get some portion of the set-aside and are not forced to the market for all of the needed allowances. In addition, the issuance of a construction permit does not assure that a particular project will be built. Requiring the project to not only have a construction permit issued, but also required notifications to the Indiana Utility Regulatory Commission provides more assurance that the allowances will be used. Due to the number of projects that have been proposed in Indiana,

the set-aside is likely to be oversubscribed in the near future and IDEM believes that any unused allowances should be made available for the following year. By setting a fixed allocation, allowances for newer sources would be restricted further.

Comment: There is concern that the banking of unused new source set-aside allowances, in conjunction with the size of the banked pool that is accumulated across the multi-state trading area, may have the unintended consequence of triggering flow control and thereby discounting the value of banked allowances. (IEUWG)

Response: IDEM understands the concern of banking new source set-aside allowances, but information to date indicates that the pool will be oversubscribed for several years to come and there will be no allowances banked. Massachusetts included provisions in their rule that would return allowances to existing sources, if the banked allowances reached a certain level.

Comment: The five percent (5%) new source set-aside should incorporate renewable types of energy. (CCGC)

Response: According to U.S. EPA guidance concerning energy efficiency and renewable energy set-asides, renewable energy projects should be awarded allowances from either the new source set-aside or the energy efficiency and renewable energy set-aside, but not both. The proposed rule includes these projects in the energy efficiency and renewable energy set aside, and IDEM believes that represents a good balance between different types of new generation.

Energy Efficiency Set-aside

Comment: The current two percent (2%) energy efficiency and renewable energy set-aside is supported as long as it does not penalize sources by making their limit more stringent, but the set-aside should not include non-emitting sources. Including non-emitting sources, such as wind power, can only increase the cost of this already expensive rule. (CIN) (IEUWG)

Comment: The energy efficiency and renewable energy set-aside is supported as currently written. (IPL)

Comment: Inclusion of an energy efficiency and renewable energy set-aside is strongly supported and would provide benefits to both Indiana's environment and economy. A clean energy set-aside would:

- Improve the environment above and beyond the NO_x by displacing conventional generation and reducing the associated pollutants including sulfur dioxide, mercury, fine particulates and carbon dioxide.
- Save businesses and households money, create local jobs, and improve productivity.
- Enhance the electric reliability system.

(SV) (SC) (VWI) (CAC) (ELPCM) (ICAA) (FBP) (SDC) (HEC) (UAW) (EC)

Response: IDEM appreciates the support.

Comment: The size of the energy efficiency and renewable energy set-aside should be increased. There is concern about utilities getting credit for making improvements that they would have made without the set-aside and the unused allowances being shifted to the new source set-aside. (HEC) (CCGC) (SC)

Response: The amount of allowances proposed by IDEM is consistent with other states that have included this set-aside. While comparing a percentage of a budget to another state or to the new source set-aside may indicate that IDEM has not included a significant number of allowances, this comparison can be deceiving. In reviewing the information from other states distributed at the board meeting, this is how the Indiana rule compares to other states:

- Indiana = 1,141 tons (2%)
- Maryland = 436 tons (3%)
- Massachusetts = 640 tons (5%)
- New York = 1,240 tons (3%)

IDEM understands the concern that some sources may receive allowances for projects that would have been undertaken absent the set-aside and will continue to work with interested parties on this issue as well as others, including the use of unused allowances.

Penalty Provisions

Comment: The rule requires installation of unproven technology and nonexistent trading program and the penalty provisions are extreme and overly punitive. The requirements that each ton of excess emissions is a separate violation and that any excess emissions is a violation of each day of the ozone season is excessive. Language should be included to provide for waivers or minor violations, especially if a source has been in compliance except for a few days at the end of the ozone season. (IPL)

Response: After reviewing the language under 326 IAC 10-4-7(k)(7), it appears that the remedy is already provided. The penalty language under subdivision (A) states:

> "For purposes of determining the number of days of violation, if a NO_x budget unit has excess emissions for an ozone control period, each day in the ozone control period, one hundred fifty-three (153) days, constitutes a day in violation <u>unless the owners and operators of the unit demonstrate that a lesser number of days should be considered</u> (emphasis added)."

If a unit has been in compliance except for the last few days of the ozone control period and it is not possible to purchase or otherwise acquire the needed allowances, the source has the opportunity to "demonstrate that a lesser number of days should be considered." IDEM appreciates the concept that "days of violation" may not be appropriate in the context of a cap and trade program, where the significant issue is whether the source has exceeded it cap and by how much. IDEM will continue to consider this comment prior to final adoption.

Allocation Methodology

Comment: The rule should be revised to include 2000 heat input data for the initial allocations. This information will be available prior to the final adoption of the rule because U.S. EPA is required to have this information by March 1st of each year. This will also make the language more consistent with how allowances are allocated in later allocations. (CIN) (IEUWG)

Response: IDEM is committed to using the most recent and representative data available. However, the rule needs a system where the data will be readily available and consistent from source to source. IDEM believes that U.S. EPA's acid rain database is the best source at this time.

Comment: The rule should be revised to change the allocation methodology for the non-electricity generating units (nonEGUs). By revising the rule to allocate either on a historical baseline, seventeen hundredths pound per mmBtu (0.17 lb/mmBtu), or a sixty percent (60%) reduction from 1995 levels, IDEM would be leveling the playing field, reducing costs, and still meet the same target. (ALCOA) (CTE)

Response: IDEM is investigating various options with the allocation methodology in an attempt to establish a fair and cost-effective methodology that still achieves the necessary reductions.

Comment: The allocation methodology should be revised to change the way the heat input for allocations is derived. Instead of using the average of the highest two (2) years over a five (5) year period, the language should be changed to just use the average over the entire five (5) years. A five (5) year average reduces some of the peaks and valleys out of the equation and adds a greater degree of predictability. (IPL)

Response: No matter which method is chosen, some companies benefit and some do not, although the differences in actual allowance allocations are small. IDEM believes that the current rule language provides an appropriate balance.

Comment: The multi-year allocation is supported, but IDEM should revise the language to extend the allocation to five (5) years. This would enhance certainty, promote long-term compliance planning and stimulate development of the trading market. (IEUWG) (AEP)

Response: IDEM believes that the balance between compliance planning and moving new sources into the "existing source pool" in a timely manner is achieved with a shorter allocation period.

Comment: The rule does not provide the necessary incentives to encourage clean energy projects. More flexibility should be provided for these projects. One way to provide additional incentive is to change the allocation methodology to treat units equally and not use a more stringent permit limit for allocations to existing units. Another incentive would be to revise the rule to use output rather than heat input for future allocations. (NS)

Response: IDEM will continue to work with interested parties to develop appropriate incentives prior to going to the board for final adoption.

Monitoring Requirements

Comment: The rule currently requires monitoring requirements in accordance with 40 CFR 75, but the language should be revised to allow for continuous emissions monitoring systems (CEMS) meeting the requirements of 40 CFR 60. (IPC)

Response: In discussions with U.S. EPA, they have not indicated that there is any flexibility for units in the trading program to use any monitoring other than monitoring under 40 CFR 75. U.S. EPA believes that precise and accurate information is needed for measuring emissions, that the 40 CFR 60 data availability requirements are not as stringent as those under 40 CFR 75, and that all sources participating in the trading program must use the same monitoring program. However, IDEM is considering other ways to treat inherently low emitting sources under this rule.

Comment: The rule should be revised to allow alternative monitoring requirements for units that use a low NO_x emissions fuel. This would reduce monitoring costs and provide an incentive for sources to switch to low NO_x fuels. (III)

Response: As noted above, IDEM is seriously exploring options for addressing units that burn inherently low NO_x emitting fuels.