

October 28, 2019

VIA HAND DELIVERY

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Re: Comments to Pending #MP-009-NPD, Inspection Right of Access

Dear Assistant Commissioners:

I am writing to comment on the Indiana Department of Environmental Management's ("IDEM's") pending nonrule policy document, MP-009-NPD, *Inspection Right of Access* ("pending NPD"), and request that the following comments be considered as IDEM makes decisions regarding the pending NPD.

1. It is clear in Sections 5.3(A)-(B) and 5.4(C) of the pending NPD that agency staff conducting business at a facility are to have obtained Inspector Credentials from the State Personnel Department and IDEM and/or U.S. EPA. Sections 6.1 and 6.2 further provide that agency staff are to present their credentials at the first possible opportunity during an inspection and may use their Employee ID if they are asked to provide a second form of identification. To make it clear that the Inspector Credentials are to be provided during an inspection, please make the following modifications to the pending NPD.
 - a. The language in Section 5.4(D) instructs the agency staff to: "Show their credential or Employee ID." Section 5.4(D) should be changed to state: "Show their Inspector Credentials and if asked for a second form of identification, show their

Employee ID.” Otherwise it could be misinterpreted that simply showing an Employee ID is sufficient.

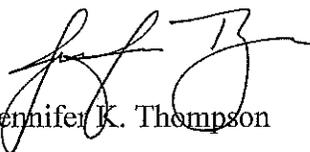
- b. For consistency and to avoid confusion, the second sentence of Section 6.1 should reference “Inspector Credentials” rather than “credential” as “Inspector Credentials” is used in Sections 5.3(A), (B) and 5.4(C).
2. Section 6.10 of the pending NPD states that agency staff may take photographs or videos of conditions at the site and Section 6.12 states that a company may make a claim of confidentiality regarding information tendered during an inspection. However, the pending NPD does not include the procedures agency staff are to follow if confidential information (which could include trade secret and or/patent protected information) is photographed and/or captured on video. And the NPD does not specify the procedures companies are to follow to ensure trade secret, and/or confidential business information is kept confidential by IDEM. Moreover, since IDEM’s rules regarding confidentiality were drafted some time ago, the rules fail to address significant issues regarding storing confidential information on electronic devices. As such, the pending NPD should be amended to include:
- a. That agency staff should only take photographs and/or videos on security protected devices issued by the state that are not linked to the cloud or other similar non-secure database(s). Use of personal devices by agency staff should be prohibited.
 - b. A recommendation that agency staff share the photographs and/or videos with the company prior concluding the inspection so that the company does not have to claim all of the photos and/or videos are confidential in order to protect its confidential information.
 - c. A protocol for how and where agency staff should store the devices used to take the photographs and/or videos to maintain the confidentiality of the information (addressing avoiding disclosure during a subsequent inspection at different facility, otherwise avoiding disclosure while the agency staff remains out of the office, as well as a general retention policy for how long confidential information may be stored on electronic devices.)
 - d. What specifically a company must do during an inspection to make a confidentiality claim regarding photographs and/or videos taken by agency staff, which the company may or may not have been able to observe. For example, how should the claim be documented, in writing, is there a form the inspector carries? The pending NPD should also state that additional supporting information must also be submitted to the Commissioner within 5 working days from the time the information claimed to be confidential is acquired by IDEM. 326 IAC 17.1-4-1(b) and (d); 327 IAC 12.1-4-1(b) and (d); and 329 IAC 6.1-4-1(b) and (d). Lastly the

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- NPD should state who the submittal should be addressed if not the Commissioner of IDEM, and the specific address where to send the supporting information.
- e. A statement to clarify situations where companies have already asserted a claim of confidentiality regarding a piece of equipment (or the like) and IDEM has agreed and is currently keeping all information regarding that piece of equipment confidential. The pending NPD should address if the company has to keep making a confidentiality request(s) each time photographs and/or videos are taken.
3. Contrary to IC § 13-14-2-2 and model permit language utilized by IDEM, Section 6.14 of the pending NPD states that agency staff may enter onto property without first presenting credentials or obtaining an administrative warrant if they are responding to or otherwise observe “exigent circumstances” necessitating an emergency situation, including: (a) a reasonable belief of risk of bodily harm or death; (b) a person in need of assistance; (c) a need to protect private property; (d) an actual or imminent destruction or removal of evidence before a search warrant may be obtained. No authority is cited for this very vague directive to agency staff that is contrary to the statutory law cited throughout the pending NPD. As a nonrule policy document “is intended to clarify for the public IDEM’s interpretation of an environmental statute or rule” and “is not intended by the agency to have the effect of law” please either remove Section 6.14 from the pending NPD or provide the authority for each component of Section 6.14 which states agency staff may enter a company’s property without first presenting credentials, as said authority is not readily apparent. (Quoted excerpts taken from IDEM’s website regarding Nonrule Policy Documents, <https://www.in.gov/idem/4694.htm>.)

I appreciate your consideration of these comments. Should you have any questions, please feel free to contact me.

Sincerely,



Jennifer K. Thompson

JKT/cb/20563001

cc: Nancy King, Esq. (via email)