TITLE 326 AIR POLLUTION CONTROL BOARD

Proposed Rule
LSA Document #07-307

DIGEST

Amends 326 IAC 20-8-1, 326 IAC 20-13-5, and 326 IAC 20-48-1 concerning incorporations by reference and operational and work practice standards. Repeals 326 IAC 20-25. Effective 30 days after filing with the Publisher.

HISTORY

Findings and Determination of the Commissioner Pursuant to IC 13-14-9-7 and Second Notice of Comment Period: June 27, 2007, Indiana Register (DIN: 20070627-IR-326070307FDA).

Notice of Public Hearing: June 27, 2007, Indiana Register (DIN: 20070627-IR-326070307PHA).

Date of First Hearing: September 5, 2007.

SUMMARY/RESPONSE TO COMMENTS FROM THE SECOND COMMENT PERIOD

The Indiana Department of Environmental Management (IDEM) requested public comment from June 27, 2007, through July 27, 2007, on IDEM's draft rule language. IDEM received comments from the following parties:

Bingham McHale LLP on behalf of the CASE Coalition (CC)

Eli Lilly and Company (ELC)

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

Comment: Lilly believes that, where appropriate the air pollution control board should utilize the new procedures for incorporating by reference that were created as part of Senate Enrolled Act 154 in the 2007 Indiana General Assembly. This procedure is faster and requires fewer agency resources. This will enable the Board to update state rules to current federal rules more quickly and more frequently.

On the other hand, when federal rules are vacated by courts or otherwise invalidated, it is not clear whether the Indiana version of the rule becomes invalid at the time the underlying federal rule becomes invalid. Unless there is some significant reason, the Indiana version of federal rules should not be in effect if the federal rules are invalidated. This is especially true since the Indiana version of the rules are adopted using streamlined rulemaking procedures based on the concept that the state is simply adopting a federal requirement and there are limited policy options when adopting it. Lilly suggests adding a provision to the Indiana incorporations by reference that would render the affected portions of the incorporation by reference invalid in the event the underlying federal rule is invalidated. (ELC)

Response: IDEM agrees that, where appropriate, the new procedures that were created as part of Senate Enrolled Act 154 in the 2007 Indiana General Assembly should be used.

This rulemaking was started under a slightly slower process that contemplates limited rulemaking policy options and that provides for a 30 day comment period, followed by two public hearings and board action. IDEM anticipated comments on the addition of a definition of "incorporation by reference." As a result of comments IDEM agrees that the definition may create confusion and therefore does not intend to recommend that the board adopt 326 IAC 1-1-7.

Comment: IDEM has proposed new language in 326 IAC 1-1-7 to clarify which version of any documents referred to in a federal rule or other document [so-called "secondary incorporations"] are incorporated into the Indiana version of the rule. Lilly believes this proposal should be withdrawn from this expedited rulemaking process because it is not clear what results the agency hopes to achieve with this proposal, the language is difficult to understand, and perhaps does not achieve the state objectives.

Lilly believes that examples of different scenarios describing how the proposal is intended to work should be provided before the Air Pollution Control Board is asked to preliminarily adopt this proposal. That would enable the public to understand the various implications of this proposal and judge the merits of the proposal.

Also, the scope of the proposal is not clear. Does this proposal include other EPA regulations that are referred to in an EPA regulation [a very common practice]? Is the proposal limited to secondary incorporations of non-regulatory documents, such as ASTM test methods?

Without knowing or understanding the problem IDEM is hoping to address with this proposal, it is difficult to understand whether the proposal is even necessary. When EPA rules incorporate by reference external documents such as ASTM standards, the General Provisions of the EPA rules state which version of the external document are incorporated.[See 40 CFR 60.17 for NSPS, 40 CFR 61.18 for NESHAPs, and 40 CFR 63.14 for MACT rules.] When Indiana adopts by reference a federal rule the federal provisions for incorporation of the secondary document should be applicable. This would keep the state and federal rules consistent.

It is also possible that the proposal could increase complexity and confusion if the secondary references include other EPA rules that are referenced in the primary rule. When EPA refers to another section of a rule or another rule in a federal rule, they intend for that reference to be dynamic. For example, if a MACT rule refers to

the MACT General Provisions in 40 CFR 63, Subpart A, the MACT rule intends to refer to the most recent version of the General Provisions, and not the version that was adopted at the time the particular MACT rule was adopted. Lilly would expect that IDEM intends this result too, but it is possible that the proposed rule could be interpreted so that the version of the General Provisions would be locked to the date the MACT rule were originally adopted. This could lead to different rules in 326 IAC 20 referring to different versions of 40 CFR Part 63, Subpart A. We don't believe that this is the intended result.

For these reasons, Lilly requests that IDEM withdraw the proposal to add 326 IAC 1-1-7 from the proposed rulemaking action until IDEM establishes the need for the proposal and stakeholders agree the proposal achieves the objectives. (ELC)

Comment: At this time the CASE Coalition supports making no change to 326 IAC 1, General Provisions, to address secondary incorporation for the following reasons:

1. IDEM has not identified the problem or inconsistency it is trying to address through the addition of proposed rule 326 IAC 1-1-7. It is unclear if the language "the date of final adoption of the section in which the document is incorporated" included in the proposed rule intends to reference the date the federal regulation became final or the date the Air Pollution Control Board final adopted the Indiana rule which incorporates the federal regulation.

2. Proposed rule 326 IAC 1-1-7 does not address or recognize existing rules 326 IAC 1-1-3 and 1-1-3.5 regarding references to the Code of Federal Regulations and the Compilation of Air Pollutant Emission Factors AP-42 and Supplements, respectively. It is not clear how these two existing rules will continue to regulate references to secondary incorporated AP-42 Emissions Factors and other CFR citations because the proposed rule is silent on this issue. (CC)

Response: IDEM agrees that draft rule 326 IAC 1-1-7, Incorporation by reference, as written may create confusion rather than clarity. For this reason, IDEM will not recommend that the Air Pollution Control Board adopt the new definition.

Comment: IDEM proposes that the Air Pollution Control Board adopt updated version of several federal MACT rules, including 40 CFR 63, Subpart EEE for Hazardous Waste Combustors and 40 CFR 63, Subpart DDDDD for Boilers and Industrial Process Heaters. Lilly requests that IDEM reconsider how the Combustor MACT and the Boiler MACT rules are addressed.

The federal versions of these rules are involved in litigation where the probability of the rule being vacated by the DC Circuit Court of Appeals is high. The Boiler MACT was vacated by the DC Circuit on June 8, 2007, and the final order to vacate the rule is expected to be issued in the next week, provided no last-minute requests to stay the vacater is requested by litigants. After the court vacates this rule, there will be nothing for Indiana to adopt by reference.

Similarly, the Combustor MACT is involved in litigation of the adequacy of its emission limitations and standards, and some parties to that litigation have expressed their belief that the Court will vacate the Combustor MACT because the Court has already vacated other MACT rules on similar grounds. If Indiana were to adopt the July 1, 2006 CFR version of the Combustor MACT and it were subsequently vacated, then Indiana sources may find themselves in a situation of having to comply with regulations that no longer exist at the federal level. If IDEM believes it must adopt the Combustor MACT rules, the Indiana version of the rule should include language that states the Indiana version of the rule is not in effect if the federal rule is vacated or otherwise invalidated. (ELC)

Comment: Although incorporating the NESHAP amendments into Indiana rules by reference is usually a simple process, the litigation regarding the validity of 40 CFR 63 Subpart DDDDD complicates this otherwise simple rulemaking process and warrants a more complex review and analysis by the Air Pollution Control Board and IDEM. The CASE Coalition urges the Air Pollution Control Board and IDEM to determine the status of the federal rule before taking additional steps to incorporated the amendments to 40 CFR Part 63, Subpart DDDDD, as printed in the December 6, 2006, Federal Register. (CC)

Response: At this time, IDEM will not recommend that the board act on either 326 IAC 20-28 or 326 IAC 20-95.

SUMMARY/RESPONSE TO COMMENTS RECEIVED AT THE FIRST PUBLIC HEARING

On September 5, 2007, the Air Pollution Control Board (board) conducted the first public hearing/board meeting concerning the development of amendments to 326 IAC 20-8-1, 326 IAC 20-13-5, and 326 IAC 20-48-1 and repeal of 326 IAC 20-25.

No public comments were received at the first hearing.

326 IAC 20-8-1; 326 IAC 20-13-5; 326 IAC 20-25; 326 IAC 20-48-1

SECTION 1. 326 IAC 20-8-1 IS AMENDED TO READ AS FOLLOWS:

326 IAC 20-8-1 Applicability; incorporation by reference of federal standards

Authority: IC 13-15-2-1; IC 13-17-3-4
Affected: IC 13-12-3-1

Sec. 1. (a) The provisions of this rule apply to each chromium electroplating or chromium anodizing tank at facilities performing:
(1) hard chromium electroplating;
(2) decorative chromium electroplating; or
(3) chromium anodizing.

(b) The air pollution control board incorporates by reference 40 CFR 63, Subpart N*, National Emission Standards for Chromium Emissions from Hard and Decorative Electroplating and Anodizing Tanks.

~~(c) Notwithstanding 326 IAC 2-7-2, nonmajor sources that have been exempted under 40 CFR 63, Subpart N* are not required to obtain a Part 70 permit from the department.~~

~~(d) Notwithstanding 326 IAC 2-7-4(a), nonmajor sources that have been deferred under 40 CFR 63, Subpart N* shall submit Part 70 permit applications to the department by December 9, 2000.~~

*This document 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 20-8-1; filed December 1, 1995, 10:00 a.m.: 19 IR 659; filed Jul 23, 1998, 4:41 p.m.: 21 IR 4521; readopted filed Jan 10, 2001, 3:20 p.m.: 24 IR 1477; filed May 21, 2002, 10:20 a.m.: 25 IR 3092)

SECTION 2. 326 IAC 20-13-5 IS AMENDED TO READ AS FOLLOWS:

326 IAC 20-13-5 Operational and work practice standards

Authority: IC 13-14-8; IC 13-17-3-4; IC 13-17-3-11
Affected: IC 13-15; IC 13-17

Sec. 5. The owner or operator of a secondary lead smelter must install and continuously operate a bag leak detection system for all baghouses controlling process and process fugitive sources. In accordance with 40 CFR 63.548(g)* and 40 CFR 63.548(h)*, baghouses equipped with HEPA filters or used exclusively for the control of fugitive dust emissions are exempt from this requirement. The owner or operator must maintain and operate each baghouse controlling process and process fugitive sources such that the following conditions are met:
(1) The alarm on the system does not activate for more than five percent (5%) of the total operating time in a six (6) month reporting period.
(2) Procedures to determine the cause of the alarm are initiated ~~within one (1) hour of the alarm~~ according to the standard operating procedures manual for corrective action required under 40 CFR 63.548*.

*These documents are 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 20-13-5; filed Dec 1, 2000, 2:22 p.m.: 24 IR 959; filed May 21, 2002, 10:20 a.m.: 25 IR 3095)

SECTION 3. 326 IAC 20-48-1 IS AMENDED TO READ AS FOLLOWS:

326 IAC 20-48-1 Applicability; incorporation by reference of federal standards

Authority: IC 13-15-2-1; IC 13-17-3-4
Affected: IC 13-12-3-1

Sec. 1. (a) This rule applies to sources as provided in 40 CFR 63.5683*.

(b) The air pollution control board incorporates by reference 40 CFR 63, Subpart VVVV*, National Emission Standards for Hazardous Air Pollutants for Boat Manufacturing, except for the following gel coat applications in Table 2 to Subpart VVVV, 40 CFR 63*, Alternative Organic Hazardous Content Requirements for Open Molding Resin and Gel Coat Operations:
(1) 3. Pigmented gel coat operations.
(2) 4. Clear gel coat operations.
(3) 7. Tooling gel coat operations.

~~(c) Sources subject to this rule are exempt from 326 IAC 20-25 after the following compliance dates as provided in Table 1 to Subpart VVVV, 40 CFR 63*, Compliance Dates for New and Existing Boat Manufacturing Facilities:~~
~~(1) August 23, 2004, for an existing source that is a major source on or before August 22, 2001.~~
~~(2) One (1) year after becoming a major source for an existing or new nonmajor source.~~
~~(3) Upon startup, whichever is later, for a new major source.~~

~~(d)~~ **(c)** A source shall use the following references or methods to estimate emissions:
(1) "Unified Emission Factors for Open Molding of Composites", July 2001*, except use of controlled spray emission factors must be approved by the commissioner and U.S. EPA.
(2) "Compilation of Air Pollution Emission Factors AP-42"*, as defined in 326 IAC 1-2-20.5, except emissions from hand layup and spray layup operations must be calculated using:
(A) emission factors referenced in subdivision (1); or
(B) site-specific values using information in subdivision (3).
(3) Site-specific values or other means of quantification provided the site-specific values and the emission factors are acceptable to the commissioner and the U.S. EPA.

*These documents are 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, Indiana Government Center-North, Tenth Floor, 100 North Senate Avenue, Indianapolis, Indiana 46204.

(Air Pollution Control Board; 326 IAC 20-48-1; filed Mar 25, 2003, 8:10 a.m.: 26 IR 2611; filed Apr 26, 2007, 9:38 a.m.: 20070523-IR-326060412FRA)

SECTION 4. 326 IAC 20-25 IS REPEALED.

Notice of Public Hearing

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